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Seventh Edition

2022 SUPPLEMENT

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Volume 6A

Washington Pattern Jury Instructions—Civil

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SEVENTH EDITION

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Appendices, Tables, and Index

2022 Supplement
Issued in April 2022

Prepared by the
WASHINGTON SUPREME COURT COMMITTEE
ON
JURY INSTRUCTIONS

HON. KRISTIN V. RICHARDSON
Co-Chair
HON. MICHAEL R. SCOTT
Co-Chair

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DEVON GIBBS (Chapter 365, Involuntary Treatment—Sexually Violent Predators), Attorney, Seattle

JEFFREY A. JAMES (Chapter 330, Employment Discrimination), Attorney, Bellevue

HON. LINDA C. KRESE (Ret.) (Chapter 160, Fraud; Chapter 165, Negligent Misrepresentation; Chapter 300, Contracts—Issues—Burden of Proof; Chapter 301, Contracts—Formation, Interpretation, and Enforceability; Chapter 301A, Equitable Alternatives—Promissory Estoppel and Quasi Contract; Chapter 302, Contracts—Performance and Breach; Chapter 303, Contracts—Remedies), Snohomish County Superior Court, Everett

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JESSE ANDREW WING (Chapter 330, Employment Discrimination), Attorney, Seattle

PREFACE

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In an effort to keep our instructions as current as possible, the WPI Committee often publishes updates when we have finished a suitable group of chapters, rather than holding an update until we have completed our review of an entire volume. For this reason, the instructions are not all current as of the same date. Readers should carefully note the currency date of a particular instruction when researching for any subsequent changes in the law. All new and revised instructions for this supplement are included in the Highlights pages.

We would like to thank each of the WPI Committee members, and our staff attorney, Stephanie Happold, for their countless hours of work, their dedication, and their inspired contributions toward improving the law. We also wish to thank the other members of the bench and bar who served on subcommittees focusing on particular specialized areas of the law. Their contributions greatly improve our work.

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WPI 155.01

CONCLUSION OF TRIAL—INTRODUCTORY INSTRUCTION

It is your duty to decide the facts in this case based

upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that has been read to you from the certified Appeal Board record [, and the exhibits that have been admitted].

[Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.]

In order to decide whether any party's claim has been proved, you must consider all of the evidence that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness and of the value or weight to be given to the testimony of each witness. In assessing credibility, you must avoid bias, conscious or unconscious, including bias based on religion, ethnicity, race, sexual orientation, gender or disability.

In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect

your evaluation or belief of a witness or your evaluation of his or her testimony.

[One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.]

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to make objections at trial. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion

based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

NOTE ON USE

Give this instruction in every workers' compensation case. This instruction is the first of the written final instructions given to the jury at the end of the trial.

Use bracketed language as appropriate.

COMMENT

The instruction contains an admonition that the jurors must not let bias, conscious or unconscious, influence their assessment of credibility. For further discussion of conscious or unconscious bias, see the Comment to WPI 1.01 (Advance Oral Instruction—Beginning of Proceeding).

For additional commentary on this pattern instruction, see WPI 1.02 (Conclusion of Trial—Introductory Instruction).

[Current as of October 2021.]

WPI 155.02

BOARD'S FINDINGS

This is an appeal from the findings and decision of the Board of Industrial Insurance Appeals. The Board made the following material findings of fact:

(Here insert the Board's material findings.)

By informing you of these findings, the court does not intend to express any opinion on the correctness or incorrectness of the Board's findings.

NOTE ON USE

This instruction should be given in every case.

COMMENT

RCW 51.52.115.

The statute requires that the exact findings of the Board on each material issue be given in the form of an instruction to the jury. The cases below discuss what constitutes a material finding of fact for this purpose, and confirm that the instruction should include only those findings deemed material by the trial court.

Jurisdictional finding. The Board's first finding of fact is commonly called the jurisdictional finding. Although contained in the Certified Appeal Board Record provided to the court, the jurisdictional history document is generally not an exhibit for consideration by the jury. Unless there is a fact in dispute that affects the Board's jurisdiction, such as the date a document was communicated to a party, it may be unnecessary to include the Board's first finding in this instruction.

On occasion, a more detailed recitation of history may be set out in the first finding when references in testimony read to the jury relate to prior adjudication of the claim and/or the results of prior litigation. When a more expanded jurisdictional finding is present, it must be kept in mind that Gaines v. Department of Labor and Industries, 1 Wn.App. 547, 551–52, 463 P.2d 269 (1969), disapproved providing the jury with findings other than those pertaining to the "ultimate fact[s]" of the case, including "recitals of summaries of evidence." Also, in McDonald v.

Department of Labor and Industries, 104 Wn.App. 617, 624, 17 P.3d 1195 (2001), the court approved an instruction directing the jury to disregard any action of opening or closing the claim.

In Stratton v. Department of Labor and Industries, 1 Wn.App. 77, 459 P.2d 651 (1969), it was held reversible error to give an instruction that sets forth a hearing examiner's rejected decision as a finding of the Board. The court noted that the trial court is required to advise the jury only of the exact findings pertaining to each material issue before the court; it is not required to instruct the jury on all matters that may have been denominated "findings" by the Board. To the same effect, see Nash v. Department of Labor and Industries, 1 Wn.App. 705, 462 P.2d 988 (1969).

Other non-material findings. "Evidentiary commentary" may properly be excised from the Board's findings as long as the revision does not change the "ultimate fact-finding." Wendt v. Dep't. of Lab. & Indus., 18 Wn.App. 674, 685, 571 P.2d 229 (1977).

In Stratton v. Department of Labor and Industries, 7 Wn.App. 652, 501 P.2d 1072 (1972), the court held that it is reversible error to include in the jury instructions comments on the claimant's behavior that are not supported by the evidence.

Commonly, only the Board's specifically-denominated findings of fact are presented in this instruction. However, the WPI Committee notes that, occasionally, the Board's conclusions of law, or the body of its decision, may actually include a finding of fact. If the court finds that inclusion of such information as a finding of fact is necessary to properly present the material issue to the jury, such information should be framed in this instruction as a finding of the Board. Gaines, 1 Wn.App. 547.

[Current as of October 2021.]

WPI 155.03

BURDEN OF PROOF

The findings and decision of the Board of Industrial Insurance Appeals are presumed correct. This presumption is rebuttable, and it is for you to determine whether it is rebutted by the evidence. The burden of proof is on (name of appellant) to establish by a preponderance of the evidence that the decision is incorrect.

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case [bearing on the question], that the proposition on which that party has the burden of proof is more probably true than not true.

NOTE ON USE

This instruction should be given in every case. The last paragraph is the same as WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

This instruction may need modification in cases when a party bears a burden of proof or rebuttable presumption at the Board level. For example, RCW 51.32.185 imposes at the Board level a rebuttal presumption against employers that melanoma in firefighters is an "occupational disease" for workers' compensation purposes. Spivey v. City of Bellevue, 187 Wn.2d 716, 727, 730, 389 P.3d 504 (2017); see also Leitner v. City of Tacoma, 15 Wn.App.2d 1, 12, 476 P.3d 618, review denied, 196 Wn.2d 1045, 481 P.3d 553 (2021) (statute provides a rebuttable presumption that heart conditions experienced by firefighters under certain conditions are an occupational disease). The Washington Supreme Court held that the trial court properly modified this instruction by adding the following paragraph informing the jury of the proper burden at the Board level:

> At the hearing before the Board of Industrial Insurance Appeals, the burden of proof is on the employer to rebut the presumption that 1) claimant's malignant melanoma arose naturally out of his conditions of employment as a firefighter and, 2) his employment is a proximate cause of his malignant melanoma.

Spivey, 187 Wn.2d at 730.

COMMENT

RCW 51.52.115 provides that the Board's findings and decision shall be "prima facie" correct. This has been interpreted to mean that there is a presumption on appeal that the findings and decision are correct until the trier of fact determines they are incorrect by a preponderance of the evidence. Allison v. Dep't of Lab. & Indus., 66 Wn.2d 263, 401 P.2d 982 (1965); see also McClelland v. ITT Rayonier, Inc., 65 Wn.App. 386, 828 P.2d 1138 (1992); Belnap v. Boeing Co., 64 Wn.App. 212, 823 P.2d 528 (1992). The court in Harrison Memorial Hospital v. Gagnon, 110 Wn.App. 475, 40 P.3d 1221 (2002), affirmed the principle that when the claimant has prevailed before the Board, the claimant does not carry an additional burden of proof before the superior court, and that the burden of proof is solely on the appealing party.

In an employer's appeal, the court held that the burden of proving that a decision of the Board is erroneous is sustained by demonstrating that there is not enough evidence to support it. Kaiser Aluminum & Chemical Corp. v. Dep't of Lab. & Indus., 43 Wn.2d 584, 262 P.2d 536 (1953).

At the trial court level, RCW 51.52.115 does not reverse or change any rebuttable presumption imposed at the Board level. Spivey v. City of Bellevue, 187 Wn.2d 716, 736, 389 P.3d 504 (2017). Rather, a party appealing a Board decision must show that the Board did not meet the applicable burden or adhere to the applicable presumption. Spivey, 187 Wn.2d at 736. For example, when employers bear a rebuttal presumption before the Board that melanoma is an "occupational disease" of firefighters, an employee appealing a Board decision meets RCW 51.52.115's standard by demonstrating that the employer's evidence at the Board level did not rebut the presumption by a preponderance of the evidence. Spivey, 187 Wn.2d at 736.

[Current as of October 2021.]

WPI 155.05

NEGLIGENCE NOT AN ISSUE

The Industrial Insurance Act applies regardless of fault or negligence. Therefore, in resolving the issues before you, you are not to consider fault or negligence, if any, of the employer or the worker [or any other person or entity].

NOTE ON USE

It is recommended that this explanation be given at some time prior to the reading of the record to the jury. This instruction may also be included in the written instructions to the jury. This instruction may not be applicable in all cases. See the Comment below.

Use the bracketed language if the evidence could lead jurors to consider the negligence or fault of some other person or entity, such as a co-worker.

COMMENT

RCW 51.04.010 provides that the Industrial Insurance Act applies without regard to fault.

This instruction may not be applicable in all cases. For example, in a case in which aggravation is asserted subsequent to an award, the reasonableness of the claimant's conduct after the award may become an issue. See McDougle v. Dep't of Lab. & Indus., 64 Wn.2d 640, 393 P.2d 631 (1964). When the only issue submitted to the jury was whether the employee was *not* acting in the course of employment at the time of injury due to significant intoxication, the employee's negligence was not at issue, but the nature of his conduct was. Gomez v. Dep't of Lab. & Indus., 13 Wn.App.2d 644, 653–54, 467 P.3d 1003 (2020). The trial court did not abuse its discretion in declining to give this instruction where it potentially could have misled the jury into believing the employee's conduct was irrelevant. Gomez, 13 Wn.App.2d at 654.

[Current as of October 2021.]

WPI 155.06

PROXIMATE CAUSE—ALLOWED CLAIM

The term "proximate cause" means a cause which in a direct sequence [, unbroken by any new independent cause,] produces the [condition] [disability] [death] complained of and without which such [condition] [disability] [death] would not have happened.

[There may be one or more proximate causes of a [condition] [disability] [death]. For a worker to recover benefits under the Industrial Insurance Act, the [industrial injury] [occupational disease] must be a proximate cause of the alleged [condition] [and] [disability] [death] for which benefits are sought. The law does not require that the [industrial injury] [occupational disease] be the sole proximate cause of such [condition] [disability] [death].]

NOTE ON USE

Use this definition of proximate cause when defining proximate cause in a case involving an allowed claim. For an alternative wording of this instruction, see WPI 155.06.02 (Proximate Cause—Allowed Claim—Alternative).

Use WPI 155.06.01 (Proximate Cause—Rejected Claim) or its alternative instruction (WPI 155.06.03) when defining proximate cause in a case involving a rejected claim.

Use bracketed material as applicable. Use the bracketed second paragraph if the evidence presents an issue of multiple causes. See the Comment below. Use the bracketed word "and" in the second sentence of the second paragraph if there is a claim for both an alleged condition and a disability. If the claim is by a surviving spouse or other beneficiary, the term "worker" should be appropriately changed.

COMMENT

Multiple proximate causes. It is probably reversible error not to give this instruction.

In Wendt v. Department of Labor and Industries, 18 Wn.App. 674,

571 P.2d 229 (1977), the court held that it is error not to give an instruction on multiple proximate causes when there is evidence to support a theory that the disability resulted from the combined effects of the industrial injury and other unrelated conditions.

The court in City of Bremerton v. Shreeve, 55 Wn.App. 334, 777 P.2d 568 (1989), held that the trial court did not err in giving an instruction adapted from WPI 155.06 that set forth a "multiple proximate cause theory" in an occupational disease case. However, the court cautioned that it is "preferable" to avoid the use of multiple proximate cause instructions in occupational disease cases when possible. The court stated these instructions could be misleading to a jury confronted with a disability to which several preexisting medical conditions have contributed, but which conditions did not arise out of the claimant's employment. Shreeve, 55 Wn.App. at 340–41. The court stated that it believed:

> [I]t would be better practice to present instructions which, after defining proximate cause as set forth in the first paragraph of WPI 155.06, convey the idea that the worker is to be taken as he or she is, and a preexisting condition should not be considered a "cause" of the injury, but merely a condition upon which the "proximate cause" operated.

Shreeve, 55 Wn.App. at 341.

Notwithstanding the statement in *Shreeve* discouraging the use of multiple proximate cause instructions in occupational disease cases, it is advisable to give the second paragraph of WPI 155.06 if the evidence presents an issue of multiple causes. Under *Wendt* it is probably reversible error if this paragraph is not given, while under *Shreeve* it is not error if it is given.

Occupational disease. In Dennis v. Department of Labor and Industries, 109 Wn.2d 467, 745 P.2d 1295 (1987), the Supreme Court sought to clarify the statutory requirement that the occupational disease arise "naturally and proximately" out of the employment. Noting that an occupational disease must arise both "naturally" and "proximately" out of employment, the court stated that the term "naturally" must be construed in its ordinary sense and must be tied to the "arising out of employment" language in RCW 51.08.140. The court further stated:

> We hold that a worker must establish that his or her occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions of his or her particular

> employment. The conditions need not be peculiar to, nor unique to, the worker's particular employment. Moreover, the focus is upon conditions giving rise to the occupational disease, or the disease-based disability resulting from work-related aggravation of a nonwork-related disease, and not upon whether the disease itself is common to that particular employment. The worker, in attempting to satisfy the "naturally" requirement, must show that his or her particular work conditions more probably caused his or her disease or disease-based disability than conditions in everyday life or all employments in general; the disease or disease-based disability must be a natural incident of conditions of that worker's particular employment. Finally, the conditions causing the disease or disease-based disability must be conditions of *employment*, that is, conditions of the worker's particular occupation as opposed to conditions coincidentally occurring in his or her workplace.

Dennis, 109 Wn.2d at 481 (emphasis in original); see also Favor v. Dep't of Lab. & Indus., 53 Wn.2d 698, 336 P.2d 382 (1959); McClelland v. ITT Rayonier, Inc., 65 Wn.App. 386, 828 P.2d 1138 (1992).

Lighting-up. In McDonagh v. Department of Labor & Industries, 68 Wn.App. 749, 845 P.2d 1030 (1993), the court held that a proximate cause instruction does not serve the same purpose as a "lighting-up" instruction, and that it is reversible error not to give an instruction on a claimant's "lighting-up" theory if it is raised as an issue and there is substantial evidence to support it. Usually, "lighting-up" arises in the context of rating or treating disability. However, the *McDonagh* case discusses "lighting-up" in the context of a rejected claim.

A pattern instruction for lighting-up cases can be found at WPI 155.20 (Lighting Up of Pre-existing, Asymptomatic Condition).

[Current as of October 2021.]

WPI 155.07

PERMANENT TOTAL DISABILITY

Total disability is an impairment of mind or body that renders a worker unable to perform or obtain a gainful occupation with a reasonable degree of success and continuity. It is the loss of all reasonable wage-earning capacity.

A worker is totally disabled if [he] [she] is unable to perform or obtain regular gainful employment as a result of an [industrial injury] [occupational disease]. A determination of total disability should be made by giving consideration to the individual worker's weaknesses and strengths, age, education, training and experience, [any permanent loss of function which pre-existed the [industrial injury] [occupational disease]] and any permanent loss of function that was proximately caused by the [industrial injury] [occupational disease].

A worker is not totally disabled solely because of inability to return to the worker's former occupation. However, total disability does not mean that the worker must have become physically or mentally helpless.

Total disability is permanent when it is reasonably probable to continue for the foreseeable future.

NOTE ON USE

Use this instruction in permanent total disability cases when there is an issue whether the industrial injury or occupational disease has rendered the worker permanently totally disabled. Use WPI 155.07.01 (Permanent Total Disability—Special Work) with this instruction if there is an issue whether the injury restricts the worker to odd jobs or to special work not generally available.

COMMENT

RCW 51.08.160. The instructional language derives from Fochtman v. Department of Labor & Industries, 7 Wn.App. 286, 499 P.2d 255

(1972), and was approved in Leeper v. Department of Labor & Industries, 123 Wn.2d 803, 872 P.2d 507 (1994).

The statute defines permanent total disability as meaning "loss of both legs, arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing any work at any gainful occupation." When a worker claims permanent total disability but does not suffer any of the disabilities specified in the statute, the inquiry becomes whether the injury permanently incapacitates the worker "from performing any work at any gainful occupation." Allen v. Dep't of Lab. & Indus., 30 Wn.App. 693, 638 P.2d 104 (1981).

The statutory language that the condition must permanently incapacitate "the worker from performing any work at any gainful occupation" does not mean that the worker must be physically or mentally helpless for all purposes except to live. The intent of the act is to insure against loss of wage earning capacity. A worker's wage earning capacity may be destroyed although the worker still has the capacity to accomplish minor tasks. Kuhnle v. Dep't of Lab. & Indus., 12 Wn.2d 191, 120 P.2d 1003 (1942); see also Spring v. Dep't of Lab. & Indus., 96 Wn.2d 914, 640 P.2d 1 (1982); Nash v. Dep't of Lab. & Indus., 1 Wn.App. 705, 462 P.2d 988 (1969).

A prima facie case of total disability can be made: when it is established that a worker was able to work prior to injury and is unable to do so after injury because of pain and the nature of the injury; when medical experts have testified to the loss of function and limitations on the ability to work; and when vocational experts have concluded that the worker is not employable in the competitive labor market. Spring, 96 Wn.2d 914; Fochtman, 7 Wn.App. 286.

For a discussion of the differences between permanent and temporary total disability, see Wilson v. Dep't of Lab. & Indus., 6 Wn.App. 902, 496 P.2d 551 (1972); Bonko v. Dep't of Lab. & Indus., 2 Wn.App. 22, 466 P.2d 526 (1970). In Washington Irrigation and Development Co. v. Sherman, 106 Wn.2d 685, 724 P.2d 997 (1986), the court held that WPI 155.07 as presented in the second edition of the WPI is a correct statement of the law and that the trial court did not err in refusing the worker's proposed instruction that referred to the "whole man theory of total disability."

The inclusion of the phrase "or obtain" in this instruction was specifically upheld in Leeper v. Department of Labor & Industries, 123 Wn.2d 803, 872 P.2d 507 (1994), disapproving the analysis in Graham v. Weyerhaeuser Co., 71 Wn.App. 55, 856 P.2d 717 (1993). The court

pointed out that "[t]he language of the statute acknowledges proof of a disability will evolve with the development of new industries, the sophistication of medical diagnoses and treatment, and the changing composition of the labor market." Leeper, 123 Wn.2d at 811. In a case in which such factors take on particular relevance, it may be appropriate to instruct further on them. Board of Industrial Insurance Appeals decisions, while not precedential, may provide helpful guidance in this regard.

The court in *Leeper* employed the phrase "reaction to the injury." The WPI Committee has recommended the phrase "and loss of function resulting from the [industrial injury] [occupational disease]" to encompass this concept.

In Adams v. Department of Labor & Industries, 128 Wn.2d 224, 231–33, 905 P.2d 1220 (1995), (discussing Turner v. Dep't of Lab. & Indus., 41 Wn.2d 739, 251 P.2d 883 (1953)) (in which a worker was found to be permanently totally disabled even though he was working at the time of claim closure), the court reasoned that work that causes serious discomfort or pain or endangers the health of the worker is not "sustainable" and supported an argument that his earning power was impaired, thus the question of permanent total disability was appropriately a jury question. The bracketed language should be added only if there is evidence limiting work activities due to serious discomfort or pain or due to endangerment of the worker's life or health.

[Current as of October 2021.]

WPI 155.07.01

PERMANENT TOTAL DISABILITY—SPECIAL WORK

If, as a result of an [industrial injury] [occupational disease], a worker is able to perform only odd jobs or special work not generally available, then the worker is totally disabled, unless the [Department] [employer] proves by a preponderance of the evidence that odd jobs or special work that he or she can perform is available to the worker [in the relevant labor market] on a reasonably continuous basis.

NOTE ON USE

Use bracketed material as applicable. Use this instruction, with WPI 155.07 (Permanent Total Disability) if there is an issue of whether the injury restricts the worker to odd jobs or to special work not generally available. When it would be helpful to the jury in resolving issues in the case, further instruction may be necessary clarifying the particular worker's relevant labor market. See the Comment below.

COMMENT

RCW 51.08.160.

This instruction is taken from Allen v. Department of Labor & Industries, 16 Wn.App. 692, 559 P.2d 572 (1977). It is error to refuse a "special work" instruction when the evidence warrants it. Wendt v. Dep't of Lab. & Indus., 18 Wn.App. 674, 571 P.2d 229 (1977).

If the injury or disease leaves a worker in such a condition that the worker can no longer follow his or her previous occupation or any other similar occupation, and is fitted only to perform "odd jobs" or special work not generally available, "the burden is on the department [or insurer] to show that there is a type of work that [the worker] can in fact obtain." Kuhnle v. Dep't of Lab. & Indus., 12 Wn.2d 191, 198–99, 120 P.2d 1003 (1942); see also Spring v. Dep't of Lab. & Indus., 96 Wn.2d 914, 640 P.2d 1 (1982); Hiatt v. Dep't of Lab. & Indus., 48 Wn.2d 843, 297 P.2d 244 (1956); Wendt, 18 Wn.App. 674. Such work must be shown to be reasonably continuous employment and not temporary in nature. Allen, 30 Wn.App. 693.

A fitness for odd jobs or special work negates a claim for total dis-

ability only when it is shown that such work is available to the worker in the worker's relevant labor market, a concept implicating geographic and other practical considerations.

In a case involving questions of the scope of a worker's relevant labor market, an additional instruction may need to be drafted to aid the jury. For the geographic component, reference may be made to WAC 296-19A-010(4) and pertinent decisions of the Board of Industrial Insurance Appeals. Other pertinent practical considerations could also be enumerated for the jury to explain what is sometimes referred to as the "competitive labor market" (i.e., the real world of employment as opposed to the purely theoretical description of jobs).

For a discussion of the difference between general work and special work, see Graham v. Weyerhaeuser Co., 71 Wn.App. 55, 856 P.2d 717 (1993), overruled on other grounds by Leeper v. Dep't of Lab. & Indus., 123 Wn.2d 803, 872 P.2d 507 (1994). The court differentiated "special work" from "general work" by characterizing general work as work that is generally available in the labor market while special work is not generally available.

[Current as of October 2021.]

WPI 155.08

PERMANENT PARTIAL DISABILITY—CATEGORIES OF IMPAIRMENT

Permanent partial disability is a loss of bodily function to a part or parts of the body, proximately caused by the [industrial injury] [occupational disease].

If the part of the body involved is a part that cannot be amputated, then loss of bodily function is measured by levels called "categories of impairment." Assessment of loss of bodily function is made by comparing the condition of the injured worker with the conditions described in the categories and selecting the most appropriate category.

Based on the evidence, select the one category that most accurately indicates the level of permanent impairment proximately caused by the [industrial injury] [occupational disease] for each area of the body listed. When more than one category may be applicable to impairment of a given area of the body, select the category that most accurately reflects the overall level of impairment of that area.

The following categories are to be compared in this case:

(Insert applicable WAC categories.)

NOTE ON USE

Use this instruction for injuries occurring, and occupational diseases deemed to have arisen, after October 1, 1974 for which a category rating system exists. To determine the date upon which an occupational disease is deemed to have arisen, see the Comment.

Use WPI 155.08.01 (Permanent Partial Disability—No Categories of Impairment) for (1) injuries occurring and occupational diseases deemed to have arisen between July 1, 1971, and October 1, 1974, and

(2) injuries or diseases arising thereafter if they involved only conditions that have not been assigned a category and must be rated as a percentage of amputation value or total bodily impairment.

If the case involves, in addition to a condition ratable by category, a condition ratable by comparison to amputation value or by comparison to total bodily impairment, instructions for both rating systems must be given using this instruction as well as WPI 155.08.01 (Permanent Partial Disability—No Categories of Impairment), with appropriate modifications.

Do not use this instruction for cases involving loss of sight or hearing only. If mental disability is involved, or the case is an aggravation case, this instruction will also have to be modified.

Use bracketed material as applicable.

COMMENT

RCW 51.32.080; WAC 296-20-220.

Permanent partial and permanent total disability are two separate concepts. See Ellis v. Dep't of Lab. & Indus., 88 Wn.2d 844, 567 P.2d 224 (1977). The determination to be made by the jury in establishing permanent partial disability is whether the worker has suffered a loss of bodily function, whereas permanent total disability involves a determination whether the worker's earning capacity is lost as a result of an occupational injury or disease. See Franks v. Dep't of Lab. & Indus., 35 Wn.2d 763, 215 P.2d 416 (1950); Fochtman v. Dep't of Lab. & Indus., 7 Wn.App. 286, 499 P.2d 255 (1972). It is error to consider loss of earning power in fixing a permanent partial disability award. Cayce v. Dep't of Lab. & Indus., 2 Wn.App. 315, 467 P.2d 879 (1970).

RCW 51.32.080(3) directs the Department of Labor and Industries to establish rules classifying permanent partial disabilities in proportion to total bodily impairment. Pursuant to this direction the Department has promulgated a categorical rating system found at WAC 296-20-200 et seq. to be used by physicians for specified disabilities. The regulations establishing these categories were upheld in Brannan v. Department of Labor and Industries, 104 Wn.2d 55, 700 P.2d 1139 (1985), and Vliet v. Department of Labor and Industries, 30 Wn.App. 709, 638 P.2d 112 (1981). Moreover, it is not error to instruct that disability is to be determined according to the categories set forth in WAC 296-20-200 et seq. Vliet, 30 Wn.App. 709. If the WAC categories are to be used by the jury in determining disability, appropriate instructions must be provided to the jury that set forth the categories.

In actions involving the loss of sight or hearing, the jury should be instructed under RCW 51.32.080(2) to determine the percentage of loss of sight or hearing. In actions involving disabilities for which no category, amputation value, or other special rating method is specified, a rating for unspecified disability is done by comparison to total bodily impairment. See WPI 155.08.01 (Permanent Partial Disability—No Categories of Impairment). Persistent variable respiratory impairment was ratable under WAC 296-20-370(1)(d) as a percentage of total bodily impairment prior to March 1, 1994. If an action involves an "aggravated" injury or disease, see WPI 155.11 (Aggravation—Prior Award) or WPI 155.12 (Aggravation—No Prior Award).

WAC 296-20-220 provides guidance for the selection of categories of impairment. Further instruction in this regard is left to the discretion of the judge.

To determine the date when an occupational disease is deemed to have arisen, see RCW 51.32.180 and WAC 296-14-350. See also Dep't of Lab. & Indus. v. Landon, 117 Wn.2d 122, 814 P.2d 626 (1991).

For the applicability of this instruction when total permanent disability is also in issue, see Allison v. Dep't of Lab. & Indus., 66 Wn.2d 263, 401 P.2d 982 (1965); Dowell v. Dep't of Lab. & Indus., 51 Wn.2d 428, 319 P.2d 843 (1957); Orr v. Dep't of Lab. & Indus., 10 Wn.App. 697, 519 P.2d 1334 (1974).

WAC 296-20-220(1)(g) provides in part that when more than one category may be applicable, the category that most accurately reflects the overall level of impairment shall be selected.

This instruction was formerly numbered WPI 155.08.01.

[Current as of October 2021.]

WPI 155.08.01

PERMANENT PARTIAL DISABILITY—NO CATEGORIES OF IMPAIRMENT

Permanent partial disability is a loss of bodily function to a part or parts of the body, proximately caused by the [industrial injury] [occupational disease].

Disability is measured by actual loss of a specific part or parts of the body if actual amputation has occurred. If the part of the body involved is a part that could be amputated but no amputation has occurred, then the disability is measured in terms of percentage of loss of function of that particular part or parts of the body. [If the part of the body involved is a part that cannot be amputated, then the loss of bodily function may be expressed as a percentage of total bodily impairment.] [Total bodily impairment is the loss of physical or mental function which is essentially complete, short of death.]

Permanent partial disability is a measure of loss of bodily function only. In evaluating permanent partial disability, the ability or inability to carry on the worker's usual occupation as well as other limitations may be considered insofar as they reflect loss of bodily function.

NOTE ON USE

Use this instruction for industrial injuries occurring or occupational diseases deemed to have arisen between July 1, 1971 and October 1, 1974, and for injuries or diseases arising thereafter involving only conditions that must be rated as a percentage of amputation value or total bodily impairment.

Use WPI 155.08 (Permanent Partial Disability—Categories of Impairment) for industrial injuries occurring or occupational diseases deemed to have arisen after October 1, 1974 for which a category rating system exists.

Use bracketed material as applicable. Use of the bracketed phrase defining total bodily impairment depends upon the user's decision as to the legal issue presented in the Comment.

Do not use this instruction for cases involving loss of sight or hearing only. If mental disability is involved, this instruction must be modified. In an aggravation case, this instruction will also have to be modified.

COMMENT

RCW 51.32.080 formerly provided that loss of bodily function be expressed as a percentage of total bodily impairment for permanent partial disability not involving amputations. The phrase "total bodily impairment" was not defined in the statute.

The bracketed sentence in this instruction defining "total bodily impairment" is derived from WAC 296-20-220(1)(d).

See the Comment accompanying WPI 155.08 (Permanent Partial Disability—Categories of Impairment) for a general discussion of permanent partial disability.

This instruction was formerly numbered 155.08 (Permanent Partial Disability).

[Current as of October 2021.]

WPI 155.09

EXTENT OF DISABILITY OR AGGRAVATION—BASIS OF MEDICAL OPINION

[The extent of (worker's name)'s industrially related physical disability] [Aggravation of (worker's name)'s industrially related condition and the extent of (worker's name)'s increased disability on the date of claimed aggravation] must be supported by medical testimony based at least in part upon one or more objective findings.

Statements of complaints by the worker made to a physician are called subjective complaints. Findings of disability that can be seen, felt, or measured by an examining physician are called objective findings.

In determining [whether aggravation has occurred and] the extent of [any resulting increased] disability, a physician cannot rely solely upon complaints, but must have some objective basis for his or her opinion. On the other hand, a physician need not rely solely upon objective findings. If there are objective findings, then the physician may also consider subjective complaints.

NOTE ON USE

This instruction should be given in cases of physical disability but should not be given in cases involving mental or emotional disability, loss of hearing or sight, or postconcussion syndrome.

COMMENT

Felipe v. Department of Labor & Industries, 195 Wn.App. 908, 918, 381 P.3d 205 (2016), cited this instruction with approval.

See Wilber v. Dep't of Lab. & Indus., 61 Wn.2d 439, 378 P.2d 684 (1963); Lewis v. ITT Cont'l Baking Co., 93 Wn.2d 1, 603 P.2d 1262 (1979); Parks v. Dep't of Lab. & Indus., 46 Wn.2d 895, 286 P.2d 104 (1955).

In Price v. Department of Labor & Industries, 101 Wn.2d 520, 529, 682 P.2d 307 (1984), the court held that it is improper to instruct the jury on the objective-subjective distinction in a case involving psychiat-

ric disability. The legal standard under *Price* is that if a medical condition cannot be supported by objective findings (e.g., "mental or emotional disability, loss of hearing or sight, or postconcussion syndrome"), then it is improper to give the instruction. However, if a medical condition can be supported by objective evidence but has not been so supported by a medical witness (e.g., the only evidence recited by a doctor in support of allowance are the subjective symptoms of the patient), then the instruction is proper.

[Current as of October 2021.]

WPI 155.10

EXTENT OF DISABILITY

You are to determine the extent of (worker's name)'s disability, if any, as it existed on or about the date that the department closed the claim, which is (date).

COMMENT

See Hyde v. Dep't of Lab. & Indus., 46 Wn.2d 31, 278 P.2d 390 (1955); Edwards v. Dep't of Lab. & Indus., 43 Wn.App. 480, 717 P.2d 1377 (1986).

[Current as of October 2021.]

WPI 155.11

AGGRAVATION—PRIOR AWARD

This is an aggravation case. (Worker's name)'s disability resulting from the [industrial injury] [occupational disease] was determined to be (insert percentage or category of disability awarded) as of (first terminal date). That determination is binding on all parties.

"Aggravation" means a worsening of a condition caused by the [industrial injury] [occupational disease] that results in [an increase in permanent disability] [a need for treatment].

The aggravation period in this case is from (date) to (date).

NOTE ON USE

Use this instruction if there has been a prior permanent partial disability award. In a case in which there has been no prior permanent partial disability award, use WPI 155.12 (Aggravation—No Prior Award).

Use WPI 155.11.01 (Aggravation—Prior Award—Burden of Proof) with this instruction.

Use bracketed material as applicable.

COMMENT

RCW 51.32.080(3); RCW 51.32.160.

The statute provides that a claimant is entitled to readjustment of an original disability award only upon a showing of aggravation of the claimant's condition. To establish aggravation a claimant must produce medical evidence to that effect based, at least in part, upon objective findings of a physician. See Dinnis v. Dep't of Lab. & Indus., 67 Wn.2d 654, 409 P.2d 477 (1965); Quine v. Dep't of Lab. & Indus., 14 Wn.App. 340, 540 P.2d 927 (1975).

[Current as of October 2021.]

WPI 155.11.01

AGGRAVATION—PRIOR AWARD—BURDEN OF PROOF

To establish that there is [increased permanent disability] [a need for treatment] because of aggravation, the worker has the burden of proving each of the following propositions [by medical testimony based at least in part upon a comparison of objective findings]:

(1) That the aggravation resulted in [increased permanent disability] [a need for treatment];

(2) That the [increased permanent disability] [need for treatment] was proximately caused by the [industrial injury] [occupational disease]; [and]

(3) That the aggravation occurred between (date) and (date) [.] [; and]

[(4) That the disability on (date) was greater than that for which an award was made on (date).]

NOTE ON USE

Use this instruction with WPI 155.11 (Aggravation—Prior Award), WPI 155.09 (Extent of Disability or Aggravation—Basis of Medical Opinion), WPI 155.13 (Weighing Medical and Lay Testimony), and the appropriate proximate cause definition from this chapter.

Use bracketed material as appropriate. Element (4) of this instruction may require modification or omission in cases of temporary aggravation.

COMMENT

See the Comment to WPI 155.11 (Aggravation—Prior Award).

As to whether medical testimony needs to be based on a comparison of objective findings, the phrase "at least in part," is intended to call attention to the need for a comparison while accurately reflecting that "an expert medical witness may not base his opinion upon subjective

symptoms alone." Kresoya v. Dep't of Lab. & Indus., 40 Wn.2d 40, 45, 240 P.2d 257 (1952); see also Lewis v. ITT Cont'l Baking, 93 Wn.2d 1, 3, 603 P.2d 1262 (1979).

[Current as of October 2021.]

WPI 155.12

AGGRAVATION—NO PRIOR AWARD

This is an aggravation case. When (worker's name)'s claim was closed on (date) it was determined that there was no permanent partial disability resulting from the [industrial injury] [occupational disease]. That determination is binding on all parties.

"Aggravation" means a worsening of a condition caused by the [industrial injury] [occupational disease] that results in [permanent disability] [a need for further treatment].

The aggravation period in this case is from (date) to (date).

NOTE ON USE

Use this instruction if plaintiff's claim has been closed at some prior time with no permanent partial disability award. In a case in which there has been a prior permanent partial disability award, use WPI 155.11 (Aggravation—Prior Award).

Use WPI 155.12.01 (Burden of Proof—Aggravation—No Prior Award) with this instruction.

Use bracketed material as applicable.

COMMENT

See White v. Dep't of Lab. & Indus., 48 Wn.2d 413, 293 P.2d 764 (1956).

[Current as of October 2021.]

WPI 155.13

WEIGHING MEDICAL AND LAY TESTIMONY

Any determination of the extent of (worker's name)'s disability must be supported by medical testimony. However, you may consider all of the testimony, both lay and medical, in evaluating (worker's name)'s disability.

NOTE ON USE

Use this instruction with WPI 155.07 (Permanent Total Disability), or WPI 155.08 (Permanent Partial Disability—Categories of Impairment), or WPI 155.08.01 (Permanent Partial Disability—No Categories of Impairment), as applicable.

Do not use this instruction with WPI 155.11 (Aggravation—Prior Award) or WPI 155.12 (Aggravation—No Prior Award).

COMMENT

See Ravsten v. Dep't of Lab. & Indus., 108 Wn.2d 143, 736 P.2d 265 (1987); Sacred Heart Med. Ctr. v. Dep't of Lab. & Indus., 92 Wn.2d 631, 600 P.2d 1015 (1979); Knowles v. Dep't of Lab. & Indus., 28 Wn.2d 970, 184 P.2d 591 (1947).

This instruction was numbered WPI 155.12 in past editions of the pattern instructions.

In light of the Washington Supreme Court opinion in Hamilton v. Department of Labor & Industries, 111 Wn.2d 569, 761 P.2d 618 (1988), a separate instruction regarding the testimony of an attending physician has been added as WPI 155.13.01.

[Current as of October 2021.]

WPI 155.13.01

TESTIMONY OF ATTENDING PHYSICIAN

You should give special consideration to testimony given by an attending physician. Such special consideration does not require you to give greater weight or credibility to, or to believe or disbelieve, such testimony. It does require that you give any such testimony careful thought in your deliberations.

NOTE ON USE

This instruction must be used when an attending physician testifies. See Comment. Use in conjunction with WPI 155.01 (Conclusion of Trial—Introductory Instruction) and WPI 2.10 (Expert Testimony).

COMMENT

In Hamilton v. Department of Labor & Industries, 111 Wn.2d 569, 761 P.2d 618 (1988), the Washington Supreme Court held that the following instruction given by the trial court did not constitute an unconstitutional comment on the evidence: "In cases under the Industrial Insurance Act of the State of Washington, special consideration should be given to the opinion of the plaintiff's attending physician." The court found that this instruction did not give the personal opinion of the trial judge and that it embodied a long-standing rule of law in workers' compensation cases that special consideration should be given to the opinion of a claimant's attending physician.

In Spalding v. Department of Labor & Industries, 29 Wn.2d. 115, 186 P.2d 76 (1947), the Supreme Court explained the reasoning behind the rule:

> While we do not desire to be understood as laying down any hard and fast rule, it is our opinion that an attending physician, assuming of course that he shows himself to be qualified, who has attended a patient for a considerable period of time for the purpose of treatment, and who has treated the patient, is better qualified to give an opinion as to the patient's disability than a doctor who has seen and examined the patient once.

Spalding, 29 Wn.2d at 128–29.

In Clark County v. McManus, 185 Wn.2d 466, 372 P.3d 764 (2016),

the court squarely held that use of this instruction is mandatory in workers' compensation cases when an attending physician testifies. It rejected Court of Appeals decisions suggesting otherwise. After discussing the case of Boeing Co. v. Harker-Lott, 93 Wn.App. 181, 968 P.2d 14 (1998) (which it described as "somewhat unique") the Supreme Court noted that some trial court discretion remained "in those instances where the instruction cannot be given, such as where there are multiple attending physicians offering conflicting testimony." McManus, 185 Wn.2d at 476 n.4.

For various types of "attending physician," see WAC 296-20-01002 ("Doctor or attending doctor").

[Current as of October 2021.]

WPI 155.14

SPECIAL VERDICT—WORKERS' COMPENSATION

(Insert caption.)

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: **Was the Board of Industrial Insurance Appeals correct in deciding that _____?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If you answered "yes" to Question 1, do not answer any further questions. If you answered "no" to Question 1, answer Question 2.)

QUESTION 2: **(Prepare appropriate questions relating to elements of the specific case, such as aggravation, increase in disability, etc.)**

(DIRECTION: Sign this verdict and notify the bailiff.)

DATE: _____ _____

Presiding Juror

NOTE ON USE

Use this special verdict in workers' compensation actions. The blank line in Question 1 should be completed by summarizing the ultimate conclusions of the Board of Industrial Appeals. The remaining interrogatories to the jury should consist of questions relating to the elements of the case, such as aggravation, increase in disability, etc.

COMMENT

This instruction was numbered WPI 115.13 in past editions of the pattern instructions.

[Current as of October 2021.]

WPI 155.20

LIGHTING UP OF PRE-EXISTING, ASYMPTOMATIC CONDITION

If you find that:

(1) before the [industrial injury] [occupational disease], (worker's name) had a [bodily] [mental] condition that was not disabling or requiring treatment; and

(2) because of the [industrial injury] [occupational disease] the pre-existing condition was lighted up or made active;

then (worker's name) is eligible for benefits for [his] [her] [full disability] [need for treatment] even though (worker's name)'s [disability] [need for treatment] may be greater than it would have been for a person in the same circumstances without that pre-existing condition.

[A worker may not be eligible for benefits, however, for any treatment or disabilities that resulted from the natural progression of the pre-existing condition independent of this [industrial injury] [occupational disease].]

NOTE ON USE

Use bracketed material as applicable.

Use this instruction for a pre-existing condition that was not disabling or requiring treatment before the industrial injury or occupational disease on which the claim is based. When the evidence is disputed as to the existence of such pre-existing treatment or disability, use both this instruction and WPI 155.21 (Worsening of Pre-Existing, Symptomatic Condition).

Use the last bracketed sentence only if the evidence would support a finding that some of the disability resulted from the natural progression of the condition even without the industrial injury or work exposure.

COMMENT

This instruction deals with proximate cause. It should be given when, although there is evidence of a pre-existing condition, there is no evidence that the pre-existing condition was causing any disability or required treatment before the industrial injury occurred or the occupational disease arose.

Miller v. Department of Labor & Industries, 200 Wash. 674, 682–83, 94 P.2d 764 (1939), first established that a worker may recover benefits for the full disability caused by an industrial injury or occupational disease, even though the worker has a pre-existing non-work-related condition:

> [I]f an injury, within the statutory meaning, lights up or makes active a latent or quiescent infirmity or weakened physical condition occasioned by disease, then the resulting disability is to be attributed to the injury, and not to the preexisting physical condition . . .
>
> [I]f the accident or injury complained of is the proximate cause of the disability for which compensation is sought, the previous physical condition of the workman is immaterial and recovery may be had for the full disability independent of any preexisting or congenital weakness . . .

See also Dennis v. Dep't of Lab. & Indus., 109 Wn.2d 467, 474, 745 P.2d 1295 (1987); Jacobson v. Dep't of Lab. & Indus., 37 Wn.2d 444, 448, 224 P.2d 338 (1950); Simpson Timber Co. v. Wentworth, 96 Wn.App. 731, 739, 981 P.2d 878 (1999); McDonagh v. Dep't of Lab. & Indus., 68 Wn.App. 749, 845 P.2d 1030 (1993); Wendt v. Dep't of Lab. & Indus., 18 Wn.App. 674, 571 P.2d 229 (1977).

A pre-existing condition may "naturally progress" on its own thus bringing about a disability or death not covered by workers' compensation benefits. However, in a case in which there is medical testimony that an industrial injury or occupational disease proximately caused this otherwise natural progression to accelerate, additional instruction to the jury on this point is recommended. Cases mentioning such "acceleration" are Mork v. Dep't of Lab. & Indus., 48 Wn.2d 74, 76–77 (1956); Harbor Plywood v. Dep't of Lab. & Indus., 48 Wn.2d 553, 556, 295 P.2d 310 (1956); Barkhurst v. Dep't of Lab. & Indus., 150 Wash. 551, 272 P.105 (1935); Shadbolt v. Dep't of Lab. & Indus., 121 Wash. 409, 412, 209 P.683 (1922).

[Current as of October 2021.]

WPI 155.21

WORSENING OF PRE-EXISTING, SYMPTOMATIC CONDITION

If you find that:

(1) at the time of the [industrial injury] [occupational disease], (worker's name) had a [bodily] [mental] condition that was symptomatic or disabling; and

(2) because of the [industrial injury] [occupational disease] the pre-existing condition was made worse;

then (worker's name) is eligible for benefits for [his] [her] [full disability] [need for treatment] even though (worker's name)'s [disability] [need for treatment] may be greater than it would have been for a person in the same circumstances without that pre-existing condition.

[A worker may not be eligible for benefits, however, for any treatment or disabilities that resulted from the natural progression of the pre-existing condition independent of this [industrial injury] [occupational disease].]

NOTE ON USE

Use bracketed material as applicable.

Use this instruction for a pre-existing condition that was symptomatic or disabling at the time of the event on which the claim is based. When the evidence is disputed as to the existence of such pre-existing pain or disability, use both this instruction and use WPI 155.20 (Lighting Up of Pre-Existing, Asymptomatic Condition).

COMMENT

A pre-existing permanent partial disability may be offset, by statute, from any increase in permanent partial disability proximately caused by a work injury or exposure. RCW 51.32.080(5); Beyer v. Dep't of Lab. & Indus., 17 Wn.2d 29, 134 P.2d 948 (1943); Tomlinson v. Puget Sound Freight Lines, Inc., 140 Wn.App. 845, 166 P.3d 1276 (2007).

For a related discussion, see the Comment to WPI 155.20 (Lighting Up of Pre-Existing, Asymptomatic Condition).

[Current as of October 2021.]

WPI 155.25

INJURY TO PARTICULAR WORKER

The Industrial Insurance Act applies to all persons covered by its provisions regardless of their age or the previous condition of their health.

In determining the effect of an occurrence upon a worker, such effect must always be determined with reference to the particular worker involved, rather than on the effect, if any, it would have had upon some other person.

NOTE ON USE

This instruction will commonly be given to the jury regarding the significance of a worker's age, health, or the presence of a medical or psychological susceptibility or condition. This instruction is intended to be used in conjunction with the appropriate proximate cause instruction pertinent to the case. See WPI 155.06 (Proximate Cause—Allowed Claim) et seq.

COMMENT

This instruction advises jurors to focus on the particular claimant with all of his or her individual attributes, including any susceptibility to the type of disability that may be at issue. It is related to, but different from, the two instructions that deal with the lighting up or the exacerbation of a pre-existing condition, WPI 155.20 and WPI 155.21. Each of these related principles is embodied in the fundamental notion that the Industrial Insurance Act takes the worker as one finds him or her, and bears responsibility for the manner and degree in which any industrial injury or occupational disease manifests itself on that individual. It is not uncommon that the circumstances of the case call for instructions on both principles.

Among the cases most often cited for these propositions are Groff v. Department of Labor and Industries, 65 Wn.2d 35, 44, 395 P.2d 633 (1964) ("industry takes the workman as he is"), Kallos v. Department of Labor and Industries, 46 Wn.2d 26, 278 P.2d 393 (1955) ("benefits are not limited to those in perfect health"), and Miller v. Department of Labor and Industries, 200 Wash. 674, 94 P.2d 764 (1939).

In *Miller,* the court had before it a longshoreman claimant with a

permanent partial disability resulting from a serious back injury coupled with a previously unknown congenital weakness of the back. The court first discussed the established principle that when an industrial injury lights up a "weakened physical condition occasioned by disease," the resultant disability is to be "attributed to the injury, and not to the preexisting physical condition." Miller, 200 Wash at 682. The court then observed:

> If this be true with respect to a weakened physical condition resulting from disease, it must likewise be true with respect to a similar infirmity resulting from some structural weakness of the body. As we have many times stated, the provisions of the workmen's compensation act are not limited in their benefits to such persons only as approximate physical perfection, for few, if any, workmen are completely free from latent infirmities originating either in disease or in some congenital abnormality. It is a fundamental principle which most, if not all, courts accept, that if the accident or injury complained of is the proximate cause of the disability for which compensation is sought, the previous physical condition of the workman is immaterial and recovery may be had for the full disability independent of any preexisting or congenital weakness; the theory upon which that principle is founded is that the workman's prior physical condition is not deemed the cause of the injury, but merely a condition upon which the real cause operated.

Miller, 200 Wash at 682–83.

[Current as of October 2021.]

WPI 155.30

OCCUPATIONAL DISEASE—DEFINITION

An occupational disease is a disease or infection that arises naturally and proximately out of the worker's employment.

A disease arises naturally out of employment if the disease comes about as a matter of course as a natural consequence of distinctive conditions of the worker's employment. It is not necessary that the conditions be peculiar to, or unique to, the particular employment. A disease does not arise naturally out of employment if it is caused by conditions of everyday life or of all employments in general.

A disease arises proximately out of employment if the conditions of the worker's employment proximately caused or aggravated the worker's disease [including aggravation of a pre-existing non-work-related disease].

NOTE ON USE

Use bracketed material as applicable.

COMMENT

RCW 51.08.140.

This instruction is drawn from the above-cited statute defining the term "occupational disease" and Dennis v. Department of Labor & Industries, 109 Wn.2d. 467, 745 P.2d 1295 (1987), which interpreted the statute.

Street v. Weyerhaeuser Co., 189 Wn.2d 187, 399 P.3d 1156 (2017), clarified *Dennis*'s evidentiary requirement that an occupational disease "arises naturally" as compared with a disease that "arises proximately" out of employment. *Street* held that expert medical testimony is not required to prove that a disease "arises naturally," but "can be established by lay testimony without the need for expert medical opinion." Street, 189 Wn.2d at 200. Medical testimony is required for the "arises proximately" prong.

WPI 155.31

TREATMENT—DEFINITION

A worker who [sustains an industrial injury] [has an occupational disease] is entitled to receive proper and necessary health care services for the diagnosis and treatment of any condition proximately caused by the [injury] [occupational disease]. Proper and necessary services may be either curative or rehabilitative.

Curative treatment is treatment intended to produce permanent changes which eliminate or lessen the clinical effects of the condition. Rehabilitative treatment is treatment intended to allow an injured or ill worker to regain functional activity on a long-term basis.

[A worker is entitled to proper and necessary health care services until the condition reaches [and maintains] a state of maximum medical improvement.] Maximum medical improvement occurs when no fundamental or marked change in the condition can be expected, with or without treatment. [The term "maximum medical improvement" is equivalent to "fixed and stable."]]

NOTE ON USE

Use this instruction when there are issues of the scope of allowable treatment.

Use bracketed language as appropriate.

COMMENT

For the most part, the language in this instruction is taken directly from RCW 51.36.010 and WAC 296-20-01002. Although these sources have not been quoted in their entirety, it is the intent of the WPI Committee to convey their central propositions that will most often be necessary. It is anticipated that, depending on the facts and issues in a particular case, additional language from these sources may need to be added as well as language from case law interpreting them. Some additional clarification may also be seen as helpful.

While RCW 51.36.010 uses the term "proper and necessary medical and surgical services," WAC 296-20-01002 uses the term "proper and necessary health care services." The WPI Committee has used the latter term in the belief that this is consistent with the law. No substantive change from the statute is intended.

In distinguishing curative and rehabilitative treatment from merely palliative treatment, WAC 296-20-01002 states "[c]urative and rehabilitative care produce long-term changes." The WPI Committee has modified this language to clarify that it is the intention to produce such changes rather than their actual production that is in issue.

To the extent that application of such terms as "clinical effects" and "functional activity" are in issue, the court and counsel should work to draft helpful clarifying instructions.

In a case involving issues of whether or not the claimant has reached a state of maximum medical improvement, it may be necessary to provide the jury with further definition. Reference should be made to the WAC definition of the term.

> Maximum medical improvement occurs when no fundamental or marked change in the accepted condition can be expected, with or without treatment. Maximum medical improvement may be present though there may be fluctuations in levels of pain and function. A worker's condition may have reached maximum medical improvement though it might be expected to improve or deteriorate with the passage of time. Once a worker's condition has reached maximum medical improvement, treatment that results only in temporary or transient changes is not proper and necessary.

WAC 296-20-01002.

The term "maximum medical improvement" is the equivalent of the formerly-used term "fixed and stable." WAC 296-20-01002. If, as often still happens, medical testimony has used the term "fixed and stable," it may be helpful to include the language explaining the equivalence of the old and new terms. Both terms anticipate the possibility of some fluctuation in a worker's condition. As the Court of Appeals has observed:

> Thus, the term "fixed" does not mean "static." It is clear that where a claimant's condition is deteriorating or further medical treatment is contemplated, the condition is not "fixed" and the claim remains open so that treatment can be provided. However, if a claimant's condition has stabilized to the point where no further medical treat-

ment is required, the condition is "fixed" for purposes of closing the claim and determining the disability award.

Pybus Steel Company v. Dep't of Lab. & Indus., 12 Wn.App. 436, 439, 530 P.2d 350 (1975).

Per WAC 296-20-03002(4), appropriate treatment does not include "[c]ontinued treatment beyond stabilization of the industrial condition(s), i.e., maintenance care . . . ." The WPI Committee is not recommending use of this language in the pattern instruction for two reasons. First, it is generally an unnecessary negative statement following the positive statement as to what is includable. Second, it could lead to jury confusion as to a distinction between "rehabilitative care" (authorized) and "maintenance care" (not authorized). Review of Board decisions suggests that certain cases could call for the drafting of further clarifying instructions to assist the jury when this distinction is in issue.

[Current as of October 2021.]

PART XII

FRAUD

CHAPTER 160

FRAUD

WPI 160.01 Elements of Fraud
WPI 160.02 Fraud—Burden of Proof
WPI 160.03 Fraud—Burden of Proof—Combined With Preponderance of Evidence
WPI 160.04 Fraud—Burden of Proof on the Issues

WPI 160.01

ELEMENTS OF FRAUD

There are nine elements of fraud. They are:

(1) Representation of an existing fact;

(2) Materiality of the representation;

(3) Falsity of the representation;

(4) The speaker's knowledge of its falsity;

(5) The speaker's intent that it be acted upon by the plaintiff;

(6) Plaintiff's ignorance of the falsity;

(7) Plaintiff's reliance on the truth of the representation;

(8) Plaintiff's right to rely upon it; and

(9) Resulting damage.

NOTE ON USE

Use either WPI 160.02 (Fraud—Burden of Proof) or WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence) on the burden of proof with this instruction. Replace "plaintiff" with the name of the person to whom the representation is made, as appropriate.

This instruction may not be needed if the jury is being instructed with WPI 160.04 (Fraud—Burden of Proof on the Issues). This instruction may be needed if another instruction refers to fraud. For example, WPI 301.01 (Contract Defined).

COMMENT

The nine elements are set forth in Stiley v. Block, 130 Wn.2d 486, 505, 925 P.2d 194 (1996), and Hoffer v. State, 110 Wn.2d 415, 425, 755 P.2d 781 (1988), affirmed on rehearing, 113 Wn.2d 148, 153, 776 P.2d 963 (1989), and the cases cited therein. If the fraud involves the transfer of property with intent to hinder a creditor or for insufficient value, see the Uniform Voidable Transactions Act, RCW Chapter 19.40, for statutory remedies.

With regard to drafting a burden of proof instruction for fraud claims, see WPI 160.02 (Fraud—Burden of Proof) and WPI 160.03 (Fraud—Burden of Proof—Combined With Preponderance of the Evidence).

[Current as of April 2021.]

WPI 160.02

FRAUD—BURDEN OF PROOF

A party who alleges [fraud] [_____] has the burden of proving each of the elements of [fraud] [_____] by clear, cogent, and convincing evidence.

Proof by clear, cogent, and convincing evidence means that the element must be proved by evidence that carries greater weight and is more convincing than a preponderance of evidence. Clear, cogent, and convincing evidence exists when occurrence of the element has been shown by the evidence to be highly probable. However, it does not mean that the element must be proved by evidence that is convincing beyond a reasonable doubt.

A "preponderance of the evidence" means that you must be persuaded, considering all the evidence in the case, that a proposition is more probably true than not true. "Preponderance of the evidence" is defined here solely to aid you in understanding the meaning of "clear, cogent, and convincing."

NOTE ON USE

Use this instruction when the jury has not been given WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence). If there is an alternative claim involving preponderance of the evidence so that WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence) is also given, use WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence) instead of this instruction.

This instruction is not limited to fraud cases. By changing the word "fraud," it may be used in any case in which the burden of proof is "clear, cogent, and convincing evidence."

For a discussion of the high probability standard, see the Comment.

COMMENT

Fraud must be proved by clear, cogent, and convincing evidence. See Stiley v. Block, 130 Wn.2d 486, 505, 925 P.2d 194 (1996); DeWolf &

Allen, 16A Washington Practice, Tort Law & Practice § 19:2 (5th ed.). For a listing of "facts" other than fraud requiring proof by clear, cogent, and convincing evidence, see Tegland, 5 Washington Practice, Evidence Law and Practice § 301.3 (6th ed.).

"Clear, cogent, and convincing evidence" denotes a quantum of evidence or degree of proof greater than a mere preponderance, but something less than proof beyond a reasonable doubt. In re Deming, 108 Wn.2d 82, 109, 736 P.2d 639 (1987); Davis v. Dep't of Lab. & Indus., 94 Wn.2d 119, 126, 615 P.2d 1279 (1980); Bland v. Mentor, 63 Wn.2d 150, 154, 385 P.2d 727 (1963).

In Holmes v. Raffo, 60 Wn.2d 421, 426, 374 P.2d 536 (1962), the court held that the failure to advise the jury that "clear, cogent, and convincing" proof is a higher degree of proof than a "preponderance of evidence" constitutes reversible error.

"Clear, cogent, and convincing" proof means proof that an occurrence is "highly probable." The high probability standard is well established as a means for defining clear, cogent, and convincing evidence. See, e.g., Dalton v. State, 130 Wn.App. 653, 666, 124 P.3d 305 (2005); State Farm Fire & Cas. Co. v. Huynh, 92 Wn.App. 454, 465–66, 962 P.2d 854 (1998); see generally DeWolf & Allen, 16A Washington Practice, Tort Law & Practice § 19.2 (5th ed.); Tegland, 5 Washington Practice, Evidence Law and Practice § 301.3 (6th ed.). Juror understanding should be improved by adding the more direct definition, supplementing the statement that the standard falls somewhere between a mere preponderance and beyond a reasonable doubt.

If an instruction defining "preponderance of evidence" has been given, use of this instruction would give the jury two conflicting tests for burden of proof. Accordingly, WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence) must be given, instead of this instruction, to avoid error. Adjustment Dep't, Olympia Credit Bureau, Inc. v. Smedegard, 40 Wn.2d 76, 78, 241 P.2d 203 (1952).

[Current as of February 2021.]

WPI 160.03

FRAUD—BURDEN OF PROOF—COMBINED WITH PREPONDERANCE OF EVIDENCE

A party who alleges [fraud] [_____] has the burden of proving each of the elements of [fraud] [_____] by clear, cogent, and convincing evidence. However, this burden of proof is applicable only to the proof of [fraud] [_____]. All other allegations of [plaintiff] [defendant] [the respective parties] must be proved by a preponderance of the evidence as that term is more fully defined in other instructions.

Proof by clear, cogent, and convincing evidence means that the element must be proved by evidence that carries greater weight and is more convincing than a preponderance of evidence. Clear, cogent, and convincing evidence exists when occurrence of the element has been shown by the evidence to be highly probable. However, it does not mean that the element must be proved by evidence that is convincing beyond a reasonable doubt.

NOTE ON USE

Use bracketed material as applicable.

Use WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence) and this instruction in any case in which it is necessary to instruct on "preponderance of the evidence" as well as on the burden of proof involved in an allegation of fraud. However, the use of this instruction is not limited to cases involving fraud. By changing the word "fraud," it may be used in any appropriate case in which the burden of proof of "clear, cogent, and convincing evidence" is used along with "preponderance of the evidence."

COMMENT

If the court also has instructed the jury on "preponderance of the evidence" (WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence)), a general instruction on the burden of proof in fraud cases (WPI 160.02 (Fraud—Burden of Proof)) would give the jury two

tests for burden of proof that appear to be in conflict. This must be clarified for the jury if error is to be avoided. Adjustment Dep't, Olympia Credit Bureau, Inc. v. Smedegard, 40 Wn.2d 76, 78, 241 P.2d 203 (1952). This instruction is designed to resolve this issue.

For a discussion of clear, cogent, and convincing evidence, and for changes made to the instruction in clarifying the definition, see the Comment accompanying WPI 160.02 (Fraud—Burden of Proof).

[Current as of February 2021.]

WPI 160.04

FRAUD—BURDEN OF PROOF ON THE ISSUES

(Name of fraud claimant(s)) **[has] [have] the burden of proving by clear, cogent, and convincing evidence each of the following elements on [his] [her] [their] [its] claim of fraud:**

(1) that (name of fraud defendant) **made a representation of existing fact;**

(2) that the fact represented was material;

(3) that the representation was false;

(4) that (name of fraud defendant) **knew the representation was false;**

(5) that (name of fraud claimant(s)) **did not know that the representation was false;**

(6) that (name of fraud defendant) **intended that** (name of fraud claimant(s)) **would act upon the representation;**

(7) that (name of fraud claimant(s)) **had a right to rely on the truth of the representation;**

(8) that (name of fraud claimant(s)) **did rely on the truth of the representation; and**

(9) that (name of fraud claimant(s)) **[was] [were] damaged by reliance on the representation.**

If you find from your consideration of all the evidence that each of these elements has been proved, your verdict should be for (name of fraud claimant(s)) **on this claim. On the other hand, if any of these elements has not been proved, your verdict should be for** (name of fraud defendant) **on this claim.**

NOTE ON USE

Use this instruction with one of the instructions on the applicable

burden of proof, WPI 160.02 (Fraud—Burden of Proof) or WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence).

COMMENT

The instruction is similar to WPI 160.01 (Elements of Fraud), but presents the information in a different format.

For a discussion of related issues, see the Comment to WPI 160.01 (Elements of Fraud).

[Current as of April 2021.]

CHAPTER 165

NEGLIGENT MISREPRESENTATION

WPI 165.00	Negligent Misrepresentation—Introduction
WPI 165.01	Negligent Misrepresentation—Affirmative Misstatement—Burden of Proof on the Issues
WPI 165.02	Negligent Misrepresentation—Failure to Disclose Information—Burden of Proof on the Issues
WPI 165.03	Negligent Misrepresentation—Failure to Disclose Information—Duty to Disclose
WPI 165.03.01	Duty to Disclose—Mixed Issues of Fact and Law
WPI 165.03.02	Duty to Disclose—Mixed Issues of Fact and Law—Special Verdict Form
WPI 165.04	Negligent Misrepresentation—Failure to Disclose Information—Fiduciary Relationship—Relationship of Trust and Confidence—Definitions
WPI 165.05	Negligent Misrepresentation—Clear, Cogent, and Convincing Evidence
WPI 165.06	Negligent Misrepresentation—Clear, Cogent, and Convincing Evidence—Combined With Preponderance of Evidence

WPI 165.00

NEGLIGENT MISREPRESENTATION—INTRODUCTION

Scope of chapter—Business transactions and pecuniary interest. Washington courts have adopted standards for negligent misrepresentation as set forth in sections 551 and 552 of the Restatement (Second) of Torts. Specialty Asphalt & Constr., LLC v. Lincoln Cnty., 191 Wn.2d 182, 421 P.3d 925 (2018). Under those sections, liability for negligent misrepresentation is limited to misrepresentations made in the course of a business transaction or a transaction in which the maker of the misrepresentation has a pecuniary interest. See, e.g., Restatement (Second) of Torts § 552(1) (1977).

In limited circumstances, a person may be liable for negligent misrepresentation when it occurs outside a business transaction or the person lacks a pecuniary interest. The Restatement (Second) of Torts

notes that liability for a negligent misrepresentation can also exist when the misrepresentation results in physical harm. See Restatement (Second) of Torts § 552 cmt. a (1977). The Restatement (Second) of Torts sets forth standards of liability for cases involving physical harm, see Restatement (Second) of Torts § 311 (1965), but Washington courts have not yet adopted this Restatement section. See Richland Sch. Dist. v. Mabton Sch. Dist., 111 Wn.App. 377, 388–89, 45 P.3d 580 (2002) (declining to adopt section 311 under the facts of the case and noting that Washington courts have not otherwise addressed the issue); see also Isakson v. WSI Corp., 771 F.Supp.2d 1257, 1264 (W.D. Wash. 2011).

Pending further development of standards for liability in other contexts, the instructions in this chapter are limited to those involving business transactions or pecuniary interests.

Two types of negligent misrepresentation. A negligent misrepresentation can be based on either an affirmative misstatement or a failure to disclose information. It is important to distinguish between the two types of cases, as different standards of liability apply. Compare Restatement (Second) of Torts § 552 (1977) (addressing affirmative misstatements), with Restatement (Second) of Torts § 551 (1977) (addressing failures to disclose information). The standards for a failure to disclose information require additional proof, including proof that the defendant owed a special duty to disclose the information to the plaintiff.

For cases involving an affirmative misstatement, the primary instruction is WPI 165.01 (Negligent Misrepresentation—Affirmative Misstatement—Burden of Proof on the Issues). For cases involving a failure to disclose information, the primary instruction is WPI 165.02 (Negligent Misrepresentation—Failure To Disclose Information—Burden of Proof On The Issues), but two additional instructions likely will be needed: WPI 165.03 (Negligent Misrepresentation—Failure To Disclose Information—Duty To Disclose), and WPI 165.04 (Negligent Misrepresentation—Failure To Disclose Information—Fiduciary Relationship—Relationship of Trust And Confidence—Definitions).

Common law, statutory, and contractual duties to disclose information. The Restatement (Second)'s standards are phrased primarily in terms of common law duties to disclose information. See, e.g., Restatement (Second) of Torts § 551(2) (1977) (setting forth circumstances under which a party has a duty to disclose information). The pattern instructions in this chapter follow the Restatement (Second)'s approach in expressing the common law duties to disclose.

Sometimes, however, a duty to disclose information is created by contract or statute. For example, a seller of real estate is statutorily

required to disclose certain information about the property being sold. See RCW 64.06.013–.022. A statutory or contractual duty may sometimes be used as the basis for a negligent misrepresentation claim. The pattern instructions can be easily modified to incorporate one of these other duties.

Clear, cogent, and convincing evidence standard. Unlike most tort claims, but consistent with the treatment of claims for fraud, the burden of proof that the plaintiff must meet for each element of a negligent misrepresentation case is clear, cogent and convincing. Specialty Asphalt, 191 Wn.2d 182. If other issues in the case are subject to a preponderance standard, the instructions will need to direct the jury to apply the correct burden of proof to the respective claims.

Comparative fault. Negligent misrepresentation claims are subject to principles of comparative fault. Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d 536, 550–54, 55 P.3d 619 (2002); ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 829–32, 959 P.2d 651 (1998). Under comparative fault principles, a plaintiff's own negligence in contributing to his or her own damages serves to reduce the plaintiff's recovery, rather than to bar recovery entirely. Baik, 147 Wn.2d at 551. Washington courts have thus rejected the Restatement (Second)'s position that a plaintiff's negligence in relying on the negligent misrepresentation is a complete bar to recovery. Baik, 147 Wn.2d at 550–51.

The principles of comparative fault do not apply until after the plaintiff has established the elements of the claim. One of the elements requires the plaintiff to prove that his or her reliance on the misrepresentation was reasonable under the circumstances. If the plaintiff was negligent in a manner that rendered the reliance unreasonable, then the plaintiff is barred from recovery, not because of the application of comparative fault, but because the plaintiff has failed to prove the elements of the claim. *Baik* recognizes as much, indicating that a plaintiff must first show reasonable reliance and proximately caused damages before comparative fault comes into play. See Baik, 147 Wn.2d at 551:

> [W]here a plaintiff reasonably reposes some trust in a misrepresentation and shows that that reliance proximately caused some damages, the automatic preclusion of a negligent misrepresentation claim on the grounds that the plaintiff could have done something more would be the sort of 'harsh result' that the comparative fault statute sought to forestall in tort claims.

Independent duty doctrine. The independent duty doctrine must be considered when a party to a contract brings a tort action against another contractual party. Under the doctrine, " '[a]n injury . . . is reme-

diable in tort if it traces back to the breach of a tort duty arising independent of the terms of the contract.' " Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 165, 273 P.3d 965 (2012) (Chambers, J., concurring) (quoting Eastwood v. Horse Harbor Found., Inc., 170 Wn.2d 380, 416, 241 P.3d 1256 (2010)). However, if there is no tort duty distinguished from the contractual obligation, then the parties are limited to contractual remedies. The independent duty doctrine is applied to a narrow range of cases, especially those involving product liability, construction on real property, or sale of real estate. Elcon, 174 Wn.2d at 165; Eastwood, 170 Wn.2d at 406–07.

The independent duty doctrine was previously known as the "economic loss rule." Elcon, 174 Wn.2d at 165. The old economic loss rule "bar[red] recovery for alleged breach of tort duties where a contractual relationship exist[ed] and the losses [were] economic losses." Alejandre v. Bull, 159 Wn.2d 674, 683, 153 P.3d 864 (2007), abrogation recognized, Key Dev. Inv., LLC v. Port of Tacoma, 173 Wn.App. 1, 24, 292 P.3d 833 (2013). By comparison, the independent duty doctrine makes no inquiry as to whether losses were economic in nature, focusing instead on whether there is a tort duty that is independent of the parties' contractual obligations, an inquiry that involves a case-by-case analysis including considerations of "common sense, justice, policy, and precedent." Elcon, 174 Wn.2d at 165; Eastwood, 170 Wn.2d at 389. Thus, cases decided under the older rule which prescribed categorical distinctions may no longer be good law.

For example, the former economic loss rule was applied to bar a negligent misrepresentation claim asserted between parties to the sale of real property. See Alejandre, 159 Wn.2d at 681–89. Whether the new independent duty doctrine applies to negligent misrepresentation claims is not clear. The only indication to date is dictum from Jackowski v. Borchelt, 174 Wn.2d 720, 738, 278 P.3d 1100 (2012). After holding that the duty to avoid *fraudulent* misrepresentation is independent of the contract, and thus the tort can be maintained between contractual parties, the *Jackowski* court went on to conclude: "The same is true for a claim of negligent misrepresentation, but only to the extent the duty to not commit negligent misrepresentation is independent of the contract." Jackowski, 174 Wn.2d at 738.

The scope, rationale, and analysis of the independent duty doctrine remain in a state of flux. Compare the plurality and concurring opinions in *Eastwood* (a plurality opinion was signed by four justices, with two separate concurring opinions) and the majority and concurring opinion in *Elcon* (the concurring opinion disagreed with the majority opinion as to the fundamental underpinnings of the independent duty doctrine and its relationship to the economic loss rule). Practitioners will need to

review the current state of the case law in determining the application of the independent duty doctrine to claims of negligent misrepresentation.

[Current as of February 2021.]

WPI 165.01

NEGLIGENT MISREPRESENTATION—AFFIRMATIVE MISSTATEMENT—BURDEN OF PROOF ON THE ISSUES

(Name of plaintiff) has the burden of proving by clear, cogent, and convincing evidence each of the following elements for the claim of negligent misrepresentation:

(1) that (name of defendant) supplied information for the guidance of others in their business transactions that was false;

(2) that (name of defendant) knew or should have known that the information was supplied to guide (name of plaintiff) in business transactions;

(3) that (name of defendant) was negligent in obtaining or communicating the false information;

(4) that (name of plaintiff) relied on the false information;

(5) that (name of plaintiff)'s reliance on the false information was reasonable; and

(6) that the false information proximately caused damages to (name of plaintiff).

If you find from your consideration of all the evidence that each of these elements has been proved, your verdict should be for (name of plaintiff) on this claim. On the other hand, if any of these elements has not been proved, your verdict should be for (name of defendant) on this claim.

NOTE ON USE

The instruction sets forth the elements of a claim for negligent misrepresentation. This instruction is to be used for claims that are based on an affirmative statement rather than on a failure to disclose information. For claims based on a failure to disclose information, use

WPI 165.02 (Negligent Misrepresentation—Failure to Disclose Information—Burden of Proof on the Issues) instead of this instruction.

Use WPI 10.01 (Negligence—Adult—Definition), the applicable proximate cause instruction from WPI Chapter 15, and one of the two instructions that set forth the clear, cogent, and convincing standard of proof: WPI 165.05 (Negligent Misrepresentation—Clear, Cogent, And Convincing Evidence) or WPI 165.06 (Negligent Misrepresentation—Clear, Cogent, And Convincing Evidence—Combined With Preponderance of Evidence) with this instruction.

This instruction may need to be modified depending on the facts and issues in a particular trial. For example, the parties may dispute whether the defendant made the statement in question in the course of business, profession, or employment, or whether the alleged statement was in fact made, or whether it was false, or the like.

COMMENT

Source of instruction. Washington courts have adopted the standards for negligent misrepresentation from section 552 of the Restatement (Second) of Torts. Specialty Asphalt & Constr., LLC v. Lincoln Cnty., 191 Wn.2d 182, 421 P.3d 925 (2018); ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 826, 959 P.2d 651 (1998); Dewar v. Smith, 185 Wn. App. 544, 342 P.3d 328 (2015) (trial court erroneously imposed summary judgment when proximate cause element was disputed); Guarino v. Interactive Objects, Inc., 122 Wn.App. 95, 129–30, 86 P.3d 1175 (2004). Section 552(1) reads as follows:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552(1) (1977).

From these standards, Washington courts have developed the following elements for the cause of action:

(1) the defendant supplied information for the guidance of others in their business transactions that was false,

(2) the defendant knew or should have known that the infor-

mation was supplied to guide the plaintiff in his business transactions,

(3) the defendant was negligent in obtaining or communicating the false information,

(4) the plaintiff relied on the false information,

(5) the plaintiff's reliance was reasonable, and

(6) the false information proximately caused the plaintiff damages.

Specialty Asphalt, 191 Wn.2d 182; Ross v. Kirner, 162 Wn.2d 493, 499, 172 P.3d 701 (2007); Austin v. Ettl, 171 Wn.App. 82, 286 P.3d 85 (2012); see also Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d 536, 545, 55 P.3d 619 (2002); ESCA Corp., 135 Wn.2d at 827–28.

Reliance. Washington cases vary in their description of the requirement as to the plaintiff's reliance. In *Ross*, the court required that a plaintiff's reliance be "reasonable." Ross, 162 Wn.2d at 499. Other opinions require that the reliance be "justifiable," which is the term used in Restatement (Second) of Torts section 552. See, e.g., ESCA Corp., 135 Wn.2d at 826–31; Van Dinter v. Orr, 157 Wn.2d 329, 332–33, 138 P.3d 608 (2006). Washington cases appear to use the terms "reasonable" and "justifiable" interchangeably. See, e.g., Baik, 147 Wn.2d at 551 (defining "justifiable reliance" in this context as meaning "reliance [that] [is] reasonable under the surrounding circumstances"); ESCA Corp., 135 Wn.2d at 828 (same holding as in *Baik*). The WPI Committee has used the word "reasonable" to convey these concepts, as it is the easiest for jurors to understand.

If the plaintiff's reliance was negligent, comparative fault does not apply. For a discussion of comparative fault, see WPI 165.00 (Negligent Misrepresentation—Introduction).

Business transactions. Liability for negligent misrepresentation under Section 552 exists only when the defendant was acting in the course of a business transaction or otherwise had a pecuniary interest in the transaction. See Restatement (Second) of Torts § 552(1) cmts. c, d (1977). For further discussion, see WPI 165.00 (Negligent Misrepresentation—Introduction).

Duty to third parties. Under Section 552 of the Restatement, a defendant may owe a duty of care to avoid misstatements not only to the person who directly receives the defendant's statements, but also to

certain third parties if the defendant knows or should know that the third party will rely upon the information. Restatement (Second) of Torts § 552 (1977). For example, in Schaaf v. Highfield, 127 Wn.2d 17, 21–27, 896 P.2d 665 (1995), the court held that a real property appraiser owed a duty of care to a prospective house buyer, even though the appraiser was hired by the lender and was not in privity with the buyer. Nonetheless, "only those in a limited class" are owed a duty of care, and whether or not the plaintiff qualifies is a question of law. Schaaf, 127 Wn.2d at 21–22, 26.

[Current as of February 2021.]

WPI 165.02

NEGLIGENT MISREPRESENTATION—FAILURE TO DISCLOSE INFORMATION—BURDEN OF PROOF ON THE ISSUES

(Name of plaintiff) has the burden of proving by clear, cogent, and convincing evidence each of the following elements for the claim of negligent misrepresentation:

(1) that the defendant had a duty to disclose to (name of plaintiff) the following information: (describe the information at issue);

(2) that (name of defendant) did not disclose this information to (name of plaintiff);

(3) that (name of defendant) was negligent in failing to disclose this information;

[(4) that the disclosure of this information would have caused (name of plaintiff) to act differently;] and

[(4)] [(5)] that (name of plaintiff) was damaged by the failure to disclose this information.

NOTE ON USE

The instruction sets forth the elements for a claim of negligent misrepresentation that is based on a failure to disclose information. For cases involving a claim of negligent misrepresentation that is based on affirmative misstatements, use WPI 165.01 (Negligent Misrepresentation—Affirmative Misstatement—Burden of Proof on the Issues) instead of this instruction.

Element (4) is set forth in brackets. It should be used in cases involving a factual dispute as to whether the defendant's nondisclosure was material to the plaintiff's decision to complete the transaction. For example, in a guaranty case a jury might find that, even if the relevant information had been disclosed, the plaintiff would have entered into the guaranty relationship anyway. On the other hand, a jury might find that that if the plaintiff had been made aware of the undisclosed infor-

mation she would not have become a guarantor. In such cases the element is appropriately included. By contrast, in cases where the primary effect of the disclosure of the information would have been to affect the terms of the transaction, such as the price, the causation element is sufficiently expressed in the damages instruction and element (4) may be omitted.

Use WPI 10.01 (Negligence—Adult—Definition), the applicable proximate cause instruction from WPI Chapter 15 (Proximate Cause), and one of the two instructions that address the clear, cogent, and convincing standard of proof: WPI 165.05 (Negligent Misrepresentation—Clear, Cogent, And Convincing Evidence) or WPI 165.06 (Negligent Misrepresentation—Clear, Cogent, And Convincing Evidence—Combined With Preponderance of Evidence) with this instruction.

See discussion in the Comment below.

COMMENT

Duty. The question of whether a defendant owed the plaintiff a duty of care is frequently referred to as a question of law for the court. See the Comment to WPI 165.03 (Negligent Misrepresentation—Failure To Disclose Information—Duty To Disclose).

The instruction is based on the standards from section 551(1) of the Restatement (Second) of Torts, which has been adopted as Washington law. See Colonial Imps., Inc. v. Carlton N.W., Inc., 121 Wn.2d 726, 731, 853 P.2d 913 (1993); Guarino v. Interactive Objects, Inc., 122 Wn.App. 95, 129–30, 86 P.3d 1175 (2004). Restatement (Second) of Torts § 551(1) (1977) reads:

> One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

Under section 551(1), liability extends only to circumstances when the defendant had a duty to exercise reasonable care in disclosing the information. The circumstances under which this duty arises are addressed in the second paragraph of section 551 and in WPI 165.03 (Negligent Misrepresentation—Failure to Disclose Information—Duty to Disclose).

As indicated in WPI 165.00 (Negligent Misrepresentation—

Introduction), the pattern instruction follows the approach of the Restatement (Second) of Torts section 551 in setting forth duties to disclose that are based on the common law. A duty to disclose information may also be imposed by contract or statute. For such cases, the instruction above may be modified. Some statutory duties may be created as part of a scheme that includes special statutory remedies; for such duties, a determination may need to be made whether the special remedy was intended to preempt other remedies, such as a negligent misrepresentation claim.

Reliance/Causation. In cases involving an affirmative misrepresentation, the plaintiff must prove reliance upon the misrepresentation in order to recover. However, where there is a failure to disclose it would be awkward to suggest that the plaintiff relied upon the *absence* of a fact or circumstance in choosing a course of action. Instead, the plaintiff must prove that, had the defendant disclosed the information in question, the plaintiff would have taken a different course of action. Ordinarily this is incorporated into the plaintiff's proof of the damage that resulted from the failure to disclose—the difference between how the transaction turned out and what the plaintiff now claims would have occurred if the missing information had been disclosed. However, in addition to the plaintiff's assertion that he, she, or they would have acted differently, the missing information must be sufficiently material to justify the remedies for misrepresentation.

[Current as of April 2021.]

WPI 165.03

NEGLIGENT MISREPRESENTATION—FAILURE TO DISCLOSE INFORMATION—DUTY TO DISCLOSE

A party to a business transaction has a duty to disclose to the other party, before the transaction is completed, the following information under [any of] these circumstances:

[(a)] [matters known to the party that the other is entitled to know because of a fiduciary relationship between them;]

[(b)] [facts basic to the transaction, if the party knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts;]

[(c)] [matters known to the party that the other is entitled to know because of a relationship of trust and confidence between them;]

[(d)] [matters known to the party that the party knows to be necessary to prevent the party's partial or ambiguous statement of the facts from being misleading;]

[(e)] [subsequently acquired information that the party knows will make untrue or misleading a previous representation that when made was true or believed to be so;]

[(f)] [the falsity of a representation made without the expectation that it would be acted upon, if the party subsequently learns that the other is about to act in reliance upon it in their transaction].

[Other than in these circumstances, a party to a business transaction is not required to disclose information to the other party.]

NOTE ON USE

Use WPI 165.02 (Negligent Misrepresentation—Failure to Disclose Information—Burden of Proof on the Issues) with this instruction if there are disputed questions of fact that prevent the court from determining the duty issue as a matter of law. Use WPI 165.04 (Negligent Misrepresentation—Failure to Disclose Information—Fiduciary Relationship—Relationship of Trust and Confidence—Definition) with this instruction, as applicable.

Paragraphs (a) and (b) are more likely to involve issues of law that would frequently be resolved by summary judgment, while paragraphs (c) through (f) would frequently involve factual issues for the jury. To the extent that any of these are determined as a matter of law before trial, the instruction would need to be modified accordingly.

Choose from items (a) through (f) according to the facts and claims involved in the particular case. The bracketed final sentence may be used if it would help jurors to better understand the legal framework.

COMMENT

The instruction is based on Section 551(2) of the Restatement (Second) of Torts, which has been adopted as Washington law. See Specialty Asphalt & Constr., LLC v. Lincoln Cnty., 191 Wn.2d 182, 421 P.3d 925 (2018); Colonial Imps., Inc. v. Carlton N.W., Inc., 121 Wn.2d 726, 731, 853 P.2d 913 (1993); Guarino v. Interactive Objects, Inc., 122 Wn.App. 95, 129–30, 86 P.3d 1175 (2004). Restatement (Second) of Torts § 551(2) (1977) reads:

> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
>
> (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and
>
> (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and
>
> (c) subsequently acquired information that he knows will make

untrue or misleading a previous representation that when made was true or believed to be so; and

(d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Duty. Whether or not the defendant owed a duty of care is usually a question of law for the court. Eastwood v. Horse Harbor Found., Inc., 170 Wn.2d 380, 394, 241 P.3d 1256 (2010); Schaaf v. Highfield, 127 Wn.2d 17, 21–22, 896 P.2d 665 (1995); Austin v. Ettl, 171 Wn.App. 82, 89, 286 P.3d 85 (2012) (concluding in the context of a CR 12(b)(6) motion that no duty existed). Sometimes, however, cases will arise where the plaintiff and the defendant present conflicting evidence concerning the facts that would give rise to a duty of care. In such cases it may be desirable to craft a special verdict form that would permit the jury to resolve the disputed factual issues while reserving the legal determination to the court. A similar process is contemplated in the determination of whether or not an attorney owes a duty to a putative client, or to a non-client, for purposes of a claim of legal malpractice. See WPI 107.03 (Duty to Non-Client—Special Verdict Form).

Organization of instruction. The organization of paragraphs (a) through (f) in the pattern instruction differs slightly from the organization of paragraphs (a) through (e) of Restatement (Second) of Torts section 551(2). Paragraph (a) of the Restatement (Second) has been separated into two separate paragraphs in the pattern instruction, one specific to fiduciary relationships and the other specific to relationships of trust and confidence. Also, the order of the paragraphs has been revised, so that the pattern instruction begins with those paragraphs that tend to involve issues of law and ends with those paragraphs that tend to be more fact-specific.

"Facts basic to the transaction." Paragraph (b) of the instruction refers to facts that are basic to the transaction. A comment to the Restatement (Second) defines "a fact basic to the transaction" as "a fact that is assumed by the parties as a basis for the transaction itself." See Restatement (Second) of Torts § 551 cmt. j (1977). The comment indicates that the fact must "[go] to the basis, or essence, of the transac-

tion," and that even some "important and persuasive inducements to enter into the transaction" do not necessarily go to its essence. Restatement (Second) of Torts § 551 cmt. j (1977). In a particular case, jurors may need to be instructed in these regards. In other cases, the facts that are basic to a transaction may be determined by a statute, in which case the instructions would need to incorporate the statutory language.

Instruction—Exception to the general rule of caveat emptor. The instruction sets forth circumstances under which one party to a business transaction owes a duty to disclose information to the other party. Such circumstances serve as exceptions to the general rule that "participants in a business transaction deal at arm's length; it has been said that an individual has no particular duty to disclose facts nor any particular right to rely on the statements of the party with whom he contracts at arm's length." Annechino v. Worthy, 175 Wn.2d 630, 636, 290 P.3d 126 (2012) (quoting Liebergesell v. Evans, 93 Wn.2d 881, 889, 613 P.2d 1170 (1980)).

[Current as of February 2021.]

WPI 165.03.01

DUTY TO DISCLOSE—MIXED ISSUES OF FACT AND LAW

(Name of plaintiff) **has the burden of proving that** (name of defendant) **owed a duty to disclose information to** (name of plaintiff).

In deciding whether this burden has been met, you are to consider whether the following [fact has] [facts have] been proved:

(Insert here the factual issues that the jury will need to resolve before the court can decide whether the duty is owed; see the Note on Use and Comment.)

You have been given a special verdict form that asks you whether [this fact has] [these facts have] been proved. Fill in the special verdict form according to your answer. Follow the directions on the special verdict form for what to do next.

NOTE ON USE

This instruction will rarely be needed. Whether the defendant had a duty to disclose will often be determined by the judge as a matter of law during pre-trial proceedings. For those cases in which a factual issue precludes a decision as a matter of law, this instruction may be used to submit the factual issue to the jury.

Use this instruction with the special verdict form found at WPI 165.03.02 (Duty to Disclose—Mixed Issues of Fact and Law—Special Verdict Form).

COMMENT

Whether the defendant owes a duty of care is usually a question of law for the court. Eastwood v. Horse Harbor Found., Inc., 170 Wn.2d 380, 394, 241 P.3d 1256 (2010); Schaaf v. Highfield, 127 Wn.2d 17, 21–22, 896 P.2d 665 (1995); Austin v. Ettl, 171 Wn.App. 82, 89, 286 P.3d 85 (2012) (concluding in the context of a CR 12(b)(6) motion that no duty existed).

Sometimes, however, cases will arise in which the plaintiff and the

defendant present conflicting evidence concerning the facts that would give rise to a duty of care. For such cases, the pattern instruction can be used to submit the factual issue to the jury. The accompanying special verdict form, WPI 165.03.02 (Duty To Disclose—Mixed Issues of Fact And Law—Special Verdict Form), can be used to record the jury's answer and to inform jurors about the next step in their deliberations—in routine cases, jurors would be told that a "yes" answer means that they should then consider the remaining elements of the negligent misrepresentation claim, while a "no" answer means that their deliberations on that claim are completed.

A similar approach for addressing mixed questions of law and fact relating to the existence of a duty is found in the chapter on legal malpractice. See WPI 107.02 (Duty to Non-Client) and WPI 107.03 (Duty to Non-Client—Special Verdict Form).

[Current as of February 2021.]

WPI 165.03.02

DUTY TO DISCLOSE—MIXED ISSUES OF FACT AND LAW—SPECIAL VERDICT FORM

QUESTION: Did (name of plaintiff) **prove the following fact[s] by clear, cogent, and convincing evidence:**

(Insert the disputed facts that the jury needs to resolve before the court can decide whether the duty is owed. A sample question is set forth in the Comment below.)

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If your answer is "yes," then you will proceed to consider the other elements of the plaintiff's [negligent misrepresentation] claim.

If your answer is "no," then your verdict is complete for this claim.)

NOTE ON USE

Use WPI 165.03.01 (Duty to Disclose—Mixed Issues of Fact and Law) with this special verdict form. This verdict form and the instruction apply only in the unusual circumstances discussed in the Note on Use and Comment to WPI 165.03.01 (Duty to Disclose—Mixed Issues of Fact and Law). The claims in the case will determine how practitioners tailor further directions to the jury about how to proceed.

COMMENT

When plaintiff's burden of proof is something other than a preponderance of the evidence, practitioners should specify the burden in the special verdict form. In this special verdict form the jury is asked whether the plaintiff has proven the necessary facts by clear, cogent, and convincing evidence.

The questions to include in this verdict form will depend on the factual dispute involved in the particular case. Practitioners will need to insure that the answer to the factual question posed to the jury is dispositive of the duty issue. In other words, the question needs to be phrased so that if the fact has been proved, a duty exists, whereas if the

fact is not proved there is no duty. The special verdict form can then be tailored to guide the jurors as to what further questions, if any, follow from the resolution of the duty issue.

For example, in a case involving an alleged relationship of trust and confidence (see WPI 165.04 (Negligent Misrepresentation—Failure To Disclose Information—Fiduciary Relationship—Relationship of Trust And Confidence—Definitions)), the following question can be used if a "yes" answer would mean that the defendant had a duty to disclose and a "no" answer would mean that no duty existed:

> Did (name of plaintiff) prove by clear, cogent, and convincing evidence that (name of defendant) purported to act or advise with (name of plaintiff)'s interest in mind?

A similar approach for addressing mixed questions of law and fact relating to the existence of a duty is found in the chapter on legal malpractice. See WPI 107.02 (Duty to Non-Client) and WPI 107.03 (Duty to Non-Client—Special Verdict Form).

[Current as of February 2021.]

WPI 165.04

NEGLIGENT MISREPRESENTATION—FAILURE TO DISCLOSE INFORMATION—FIDUCIARY RELATIONSHIP—RELATIONSHIP OF TRUST AND CONFIDENCE—DEFINITIONS

[A fiduciary relationship exists when one person has a duty to act primarily for the benefit of another. [A fiduciary relationship existed between (name of party) **and** (name of other party)**.] [**(Name of party) **and** (name of other party) **had a fiduciary relationship if you find that** (insert facts that are in dispute)**.]]**

[A relationship of trust and confidence exists when one person has gained the trust and confidence of the other and purports to act or advise with the other's interest in mind.]

NOTE ON USE

Use WPI 165.03 (Negligent Misrepresentation—Failure to Disclose Information—Duty to Disclose) with this instruction.

Use the first paragraph for cases involving a fiduciary duty. Within that paragraph, the first sentence would always be used. Choose between the second and third sentences depending on whether there are any remaining issues for the jury to resolve. Most often, the paragraph's second sentence would be used, instead of the third, because the existence of a fiduciary duty will usually already have been determined by the trial judge as a matter of law.

Use the second paragraph for cases involving a relationship of trust and confidence. Factual issues will often exist for these relationships.

COMMENT

A good summary of this area of the law is set forth in Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wn.App. 732, 741–42, 935 P.2d 628 (1997):

> Fiduciary relationships include those historically regarded as fiduciary, and also may arise in circumstances in which 'any person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former.' Liebergesell v.

> Evans, 93 Wash.2d 881, 890–91, 613 P.2d 1170 (1980). In general, "[a] fiduciary relationship imparts a position of *peculiar confidence placed by one individual in another*. A fiduciary is a person with a duty to act *primarily for the benefit of another*." Denison State Bank v. Madeira, 230 Kan. 684, 230 Kan. 815, 640 P.2d 1235, 1241 (1982). 'The facts and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party.' Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 340 S.E.2d 786, 790 (1986). In other words, the plaintiff must show some dependency on his or her part and some undertaking by the defendant to advise, counsel and protect the weaker party. For example, a plaintiff's lack of business expertise, and a defendant's undertaking the responsibility of providing financial advice to a close friend or family member, may indicate a fiduciary relationship. McGowan v. Pillsbury Co., 723 F.Supp. 530, 536 (W.D.Wash. 1989).

(Emphasis in original.) See also In re Jones, 170 Wn.App. 594, 606, 287 P.3d 610 (2012) (a "confidential relationship exists when one person has gained the confidence of the other and purports to act or advise with the other's interest in mind"); Endicott v. Saul, 142 Wn.App. 899, 923, 176 P.3d 560 (2008) (same holding as in *Jones*); Cummings v. Guardianship Servs. of Seattle, 128 Wn.App. 742, 755 n.33, 110 P.3d 796 (2005) (a "fiduciary is a person with a duty to act primarily for the benefit of another"); Guarino v. Interactive Objects, Inc., 122 Wn.App. 95, 128, 86 P.3d 1175 (2004) (same holding as in *Cummings*).

Washington case law sometimes refers to the relationship of trust and confidence as a quasi-fiduciary relationship. See, e.g., Colonial Imps., Inc. v. Carlton N.W., Inc., 121 Wn.2d 726, 732, 853 P.2d 913 (1993) (quoting Favors v. Matzke, 53 Wn.App. 789, 796, 770 P.2d 686 (1989)).

[Current as of February 2021.]

WPI 165.05

NEGLIGENT MISREPRESENTATION—CLEAR, COGENT, AND CONVINCING EVIDENCE

Proof by clear, cogent, and convincing evidence means that the element must be proved by evidence that carries greater weight and is more convincing than a preponderance of evidence. Clear, cogent, and convincing evidence exists when occurrence of the element has been shown by the evidence to be highly probable. However, it does not mean that the element must be proved by evidence that is convincing beyond a reasonable doubt.

A "preponderance of the evidence" means that you must be persuaded, considering all the evidence in the case, that a proposition is more probably true than not true. "Preponderance of the evidence" is defined here solely to aid you in understanding the meaning of "clear, cogent, and convincing."

NOTE ON USE

Use this instruction when the jury has not been given WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence). If there is an alternative claim involving preponderance of the evidence so that WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence) is also given, use WPI 165.06 (Negligent Misrepresentation—Clear, Cogent, and Convincing Evidence—Combined with Preponderance of Evidence) instead of this instruction.

COMMENT

Negligent misrepresentation must be proved by clear, cogent, and convincing evidence. Specialty Asphalt & Constr., LLC v. Lincoln Cnty., 191 Wn.2d 182, 421 P.3d 925 (2018); Ross v. Kirner, 162 Wn.2d 493, 499, 172 P.3d 701 (2007); Van Dinter v. Orr, 157 Wn.2d 329, 333, 138 P.3d 608 (2006); DeWolf & Allen, 16A Washington Practice, Tort Law & Practice § 19:12 (5th ed.).

"Clear, cogent, and convincing evidence" denotes a quantum of evidence or degree of proof greater than a mere preponderance, but something less than proof beyond a reasonable doubt. In re Deming,

108 Wn.2d 82, 109–10, 736 P.2d 639 (1987); Tiger Oil Corp. v. Yakima Cnty., 158 Wn.App. 553, 562, 242 P.3d 936 (2010). A failure to advise the jury that "clear, cogent, and convincing" proof is a higher degree of proof than a "preponderance of evidence" constitutes reversible error. Holmes v. Raffo, 60 Wn.2d 421, 425–26, 374 P.2d 536 (1962).

The high probability standard is now well established as a means for defining clear, cogent, and convincing evidence. See, e.g., Portmann v. Herard, 2 Wn.App.2d 452, 409 P.3d 1199 (2018); In re J.A.F., 168 Wn.App. 653, 667, 278 P.3d 673 (2012); Wright v. Dave Johnson Ins. Inc., 167 Wn.App. 758, 774, 275 P.3d 339 (2012); see generally DeWolf & Allen, 16A Washington Practice, Tort Law & Practice § 19:27 (5th ed.); Tegland, 5 Washington Practice, Evidence Law and Practice § 301.3 (6th ed.).

[Current as of February 2021.]

WPI 165.06

NEGLIGENT MISREPRESENTATION—CLEAR, COGENT, AND CONVINCING EVIDENCE—COMBINED WITH PREPONDERANCE OF EVIDENCE

A party who alleges negligent misrepresentation has the burden of proving each of the elements of negligent misrepresentation by clear, cogent, and convincing evidence. However, this burden of proof is applicable only to the proof of negligent misrepresentation. All other allegations of [plaintiff] [defendant] [the respective parties] must be proved by a preponderance of the evidence as that term is more fully defined in other instructions.

Proof by clear, cogent, and convincing evidence means that the element must be proved by evidence that carries greater weight and is more convincing than a preponderance of evidence. Clear, cogent, and convincing evidence exists when occurrence of the element has been shown by the evidence to be highly probable. However, it does not mean that the element must be proved by evidence that is convincing beyond a reasonable doubt.

NOTE ON USE

Use bracketed material as applicable.

Use WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence) with this instruction in any case in which it is necessary to instruct on "preponderance of the evidence" as well as on the burden of proof involved in an allegation of negligent misrepresentation.

COMMENT

If the court also has instructed the jury on "preponderance of the evidence" (WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence)), a general instruction on the burden of proof in negligent misrepresentation cases would give the jury two tests for burden of proof that appear to be in conflict. Failure to give a clarifying instruction on the different burdens of proof is reversible error. Adjustment

Dep't Olympia Credit Bureau v. Smedegard, 40 Wn.2d 76, 77–79, 241 P.2d 203 (1952). This instruction is designed to resolve this issue.

For a discussion of clear, cogent, and convincing evidence, see the Comment to WPI 165.05 (Negligent Misrepresentation—Clear, Cogent, and Convincing Evidence).

[Current as of February 2021.]

PART XIII

CONTRACTS

CHAPTER 300

CONTRACTS—ISSUES—BURDEN OF PROOF

WPI 300.00 Introduction
WPI 300.01 Issues—Breach of Contract—Damages
WPI 300.01.01 Issues—Contract—Alternative
WPI 300.02 Burden of Proof on the Issues—Breach of Contract—No Affirmative Defense
WPI 300.03 Burden of Proof on the Issues—Breach of Contract—With Affirmative Defenses

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WPI 300.00

INTRODUCTION

The subject of contracts is necessarily broad. The WPI Committee has drafted pattern instructions that address some of the more common issues in this broad field.

The instructions in Part XIII are designed for use in non-Uniform Commercial Code cases. For Uniform Commercial Code cases, see RCW Title 62A, and particularly the Washington Comments set forth in the RCW Annotated. Employment issues are addressed separately in WPI Part XVI (Employment). Consumer protection issues are addressed in WPI Part XIV (Consumer Protection).

Broad instructions on the issues and on burden of proof are set forth in WPI Chapter 300. These instructions are designed for a breach of contract action for damages, with and without affirmative defenses. The remaining wide variety of types of contract actions are addressed in the skeletal format of WPI 300.01.01 (Issues—Contract—Alternative).

Issues of contract formation, interpretation, and enforcement are addressed in WPI Chapter 301. The WPI Committee has elected not to address a number of specific contract formation issues in the form of

pattern instructions because such issues are rarely presented for jury resolution. A number of bases for the equitable remedy of rescission, such as mutual or unilateral mistake, or undue influence, may also be asserted as defenses to contract enforcement, and it is in this context that the WPI Committee felt they would be most likely to reach a jury.

Equitable alternative remedies are presented separately in WPI Chapter 301A. Although the role of the jury with respect to these issues may be different from the jury's role as fact finder in a strictly legal breach of contract cause of action, as a practical matter these issues are often presented to juries together with, and as alternatives to, legal claims.

Some of the more common issues related to performance of contractual duties, excuses for nonperformance, and breaches of contract are addressed in WPI Chapter 302. These instructions are drafted for the context in which they are most likely to arise in a breach of contract action. For example, defenses that, if established, would either relieve or discharge a defendant's duty of performance are labeled "excuse of performance," even though they may also be raised in a number of different procedural postures.

The chapter on remedies, WPI Chapter 303, focuses on the action for damages for breach of contract, because that is the legal remedy with which juries are most naturally concerned. The potential advisory role of the jury in making findings that may assist the court in fashioning equitable remedies, however, suggests that it may be necessary in specific cases to develop a number of verdict forms with specific interrogatories.

For comprehensive discussions of non-U.C.C. contract issues in Washington courts, see generally DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice (3d ed.).

[Current as of April 2021.]

WPI 300.01

ISSUES—BREACH OF CONTRACT—DAMAGES

The following is a summary of the claims of the parties provided to help you understand the issues in the case. You are not to take this instruction as proof of the matters claimed. It is for you to decide, based upon the evidence presented, whether a claim has been proved.

(1) The plaintiff, (name of plaintiff)**, claims that the defendant,** (name of defendant)**, entered into a contract with the plaintiff [to] [for]** (insert general terms of alleged contract)**.** (Name of plaintiff) **claims that** (name of defendant) **breached this contract [by] [in one or more of the following respects:]**

(Set forth in simple form without undue emphasis or repetition plaintiff's claims of breach that have not been withdrawn or stricken by the court and are supported by the evidence. Use the last bracketed phrase above if there is more than one claim of breach.)

(Name of plaintiff) **also claims to have sustained damages as a result of [this] [these] breach[es] of the contract, and seek[s] a judgment against** (name of defendant) **for these damages.**

(Name of defendant) **denies [this claim] [these claims].**

(2) [In addition, (name of defendant) **claims as [an] affirmative defense[s]:**

(Set forth in simple form without undue emphasis or repetition any affirmative defense that has not been withdrawn or stricken by the court and is supported by the evidence.)

(Name of plaintiff) **denies [this claim] [these claims].]**

[(3)] [(Name of defendant) further denies that (name of plaintiff) was damaged.]

[(4)] [(Name of defendant) further denies the nature and extent of the claimed damage.]

NOTE ON USE

This instruction is patterned after WPI 20.01 (Issues). The instruction is adapted for a plaintiff's breach of contract action when the plaintiff is seeking damages. Use the bracketed material as applicable to the case.

Do not use this instruction if the case has contract issues, but does not involve a plaintiff's breach of contract action, or if the plaintiff is seeking a remedy other than damages. Instead, use and adapt the simplified form of WPI 300.01.01 (Issues—Contract—Alternative).

The numbers in parentheses preceding each paragraph should not be included when the instruction is given. They are used here for convenience in referring to paragraphs in this note and when instructions are being prepared for a particular case. Paragraph (1) will always be used. The pertinent bracketed paragraphs (2) through (4) should be selected according to the issues properly in the case and supported by the evidence. A particular case may require additional modifications.

This instruction and WPI 300.02 (Burden of Proof on the Issues—Breach of Contract—No Affirmative Defense) or WPI 300.03 (Burden of Proof on the Issues—Breach of Contract—With Affirmative Defenses) are designed to be used in most simple breach of contract cases. More specific instructions regarding contract formation issues, set forth in WPI Chapter 301, should be used if the jury is called upon to resolve those particular issues. Performance and breach issues are set forth in WPI Chapter 302, and damage instructions are set forth in WPI Chapter 303.

Use WPI 6.10.02 (Use of Admissions or Binding Stipulations Under CR 36(b)) when reference to admissions is appropriate.

These instructions are designed for use in non-Uniform Commercial Code cases. For Uniform Commercial Code cases, see RCW Title 62A, and particularly the Washington Comments set forth in the RCW Annotated. For employment contract issues, see WPI Part XVI (Employment). For consumer protection issues, see WPI Part XIV (Consumer Protection).

COMMENT

Generally, a plaintiff in a contract action must prove a valid contract between the parties, a breach, and resulting damage. Lehrer v. State, Dep't of Soc. & Health Servs., 101 Wn.App. 509, 516, 5 P.3d 722 (2000); Nw. Indep. Forest Mfrs. v. Dep't of Lab. & Indus., 78 Wn.App. 707, 712, 899 P.2d 6 (1995).

For a discussion of actual damages versus nominal damages, see the Comment to WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim).

For comprehensive discussions of non-U.C.C. contract issues in Washington courts, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice (3d ed.).

See the Comment to WPI 20.01 (Issues).

[Current as of April 2021.]

WPI 300.01.01

ISSUES—CONTRACT—ALTERNATIVE

The following is a summary of the claims of the parties provided to help you understand the issues in the case. You are not to take this instruction as proof of the matters claimed. It is for you to decide, based upon the evidence presented, whether a claim has been proved.

(1) The plaintiff, (name of plaintiff)**, claims:**

(Set forth in simple form without undue emphasis or repetition plaintiff's claims that have not been withdrawn or stricken by the court and are supported by the evidence.)

The defendant, (name of defendant)**, denies [this claim] [these claims].**

[(2)] [In addition, (name of defendant) **claims:**

(Set forth in simple form without undue emphasis or repetition defendant's claims, including any affirmative defenses that have not been withdrawn or stricken by the court and are supported by the evidence.)

(Name of plaintiff) **denies [this claim] [these claims].]**

NOTE ON USE

Use WPI 300.01 (Issues—Breach of Contract—Damages) instead of this instruction when the plaintiff is suing for damages for breach of contract. This instruction's simplified format is designed for cases involving other contract issues.

See the Note on Use and Comment to WPI 300.01 (Issues—Breach of Contract—Damages). See also WPI 20.01 (Issues).

[Current as of April 2021.]

WPI 300.02

BURDEN OF PROOF ON THE ISSUES—BREACH OF CONTRACT—NO AFFIRMATIVE DEFENSE

The plaintiff, (name of plaintiff), has the burden of proving each of the following propositions on plaintiff's claim of breach of contract:

[(1)] [That the defendant, (name of defendant), entered into a contract with (name of plaintiff);]

[(2)] [That the terms of the contract included:

(Insert a general statement of material terms);]

[(3)] [That (name of defendant) breached the contract [as] [in one or more of the ways] claimed by (name of plaintiff);]

[(4)] [That (name of plaintiff) [was not in [material] breach of] [had performed or offered to perform its obligations under] [was excused from performing its obligations under] the contract;]

[(5)] [That (insert any condition precedent the occurrence of which plaintiff must prove) had occurred;] [and]

[(6)] [That (name of plaintiff) was damaged as a result of (name of defendant's) breach].

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if any of these propositions has not been proved, your verdict should be for (name of defendant) [on this claim].

NOTE ON USE

Use this instruction for breach of contract actions not involving any

affirmative defenses. The instruction will need to be revised if the contract claim is being brought by a party other than the plaintiff.

This instruction is patterned after WPI 21.02 (Burden of Proof on the Issues—No Affirmative Defense), adapted for use in a standard breach of contract case. Depending upon the issues remaining in the case, select the appropriate paragraphs (1) through (6).

Use this instruction in combination with an appropriate instruction from WPI Chapter 303 (Contracts—Remedies).

Regarding bracketed paragraphs (4) and (5), see the Comment's discussion about conditions precedent and material breaches of contract. Consider whether it would be appropriate to use WPI 302.02 (Conditions Precedent or Conditions Concurrent) in combination with this instruction.

Regarding bracketed paragraph (6), see the Comment to WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim), for a discussion of actual damages versus nominal damages.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence) when the case involves only issues that require proof by a preponderance of evidence. Use this instruction with WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence) when the case also involves issues, such as fraud, that require proof by clear, cogent, and convincing evidence.

Use this instruction with WPI 300.01 (Issues—Breach of Contract—Damages).

Use WPI 300.03 (Burden of Proof on the Issues—Breach of Contract—With Affirmative Defenses), if there are affirmative defenses to be considered by the jury.

If there is a counterclaim for damages by defendant, set forth the alternative findings as in WPI 21.04 (Burden of Proof on the Issues—Counterclaim), adapted for a contract action.

In a case in which some of the elements of the claim have been admitted by the party defending the claim, it may be appropriate to insert a reference to such admissions. Cf. WPI 6.10.02 (Use of Admissions or Binding Stipulations under CR 36(b)), and WPI Chapter 23 (Admitted Liability).

COMMENT

For the essential elements of a breach of contract claim, see the Comment to WPI 300.01 (Issues—Breach of Contract—Damages).

Burden of proof. The appropriate standard of proof for a breach, even when the alleged breach consists of misrepresentation or concealment of a material fact (in an insurance claim), is a preponderance of evidence rather than clear, cogent, and convincing evidence. Allstate Ins. Co. v. Huston, 123 Wn.App. 530, 542, 94 P.3d 358 (2004); St. Paul Mercury Ins. Co. v. Salovich, 41 Wn.App. 652, 657, 705 P.2d 812 (1985).

Conditions precedent. With regard to paragraphs (4) and (5), the "party seeking enforcement of the contract has the burden of proving performance of an express condition precedent." Walter Implement, Inc. v. Focht, 107 Wn.2d 553, 557, 730 P.2d 1340 (1987) (citing Ross v. Harding, 64 Wn.2d 231, 391 P.2d 526 (1964)).

"If a contract requires performance by both parties, the party claiming nonperformance of the other must establish as a matter of fact the party's own performance." Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986), quoted in Wallace Real Est. Inv., Inc. v. Groves, 124 Wn.2d 881, 897, 881 P.2d 1010 (1994).

It has also been said that "one who seeks to enforce the terms of a contract against another or to recover damages for the breach of a contract by another must show that there has been no breach on his own part." Downs v. Smith, 169 Wash. 203, 13 P.2d 440 (1932). This applies unless the defendant's performance is a condition precedent to plaintiff's performance (i.e., the duties are not concurrent), or unless plaintiff's performance is otherwise excused or discharged. Willener, 107 Wn.2d 388. In *Willener*, duties were concurrent and neither party performed, so neither could claim damages for breach. See the Comment to WPI 302.02 (Conditions Precedent or Conditions Concurrent).

Materiality of breach. Although the quotation above from *Willener* and *Wallace* suggests that even a trivial breach by the plaintiff of a condition precedent will preclude the plaintiff from recovering for a defendant's breach, Washington cases do not necessarily so hold. For example, in Jacks v. Blazer, 39 Wn.2d 277, 285, 235 P.2d 187 (1951), the court held that a "breach or non-performance of a promise by one party to a bilateral contract, so material as to justify a refusal of the other party to perform a contractual duty, discharges that duty." See also Rosen v. Ascentry Techs., Inc., 143 Wn.App. 364, 369, 177 P.3d 765 (2008) (quoting Jacks, 39 Wn.2d at 286); Dwinell's Cent. Neon v. Cosmopolitan Chinook Hotel, 21 Wn.App. 929, 936–37, 587 P.2d 191 (1978) (quoting Jacks, 39 Wn.2d at 285).

Neither *Willener* nor *Wallace* necessarily alters this principle. See Willener, 107 Wn.2d at 394 (the court's analysis incorporated materiality of the breach by addressing whether the plaintiffs sufficiently

performed under the agreement to claim the defendants' nonperformance); Wallace, 124 Wn.2d at 897–99 (the court did not need to address materiality, because the breach related to the plaintiff's primary duty under the contract—to tender payment for the goods being purchased). Due to the unsettled nature of the law, the word "material" is bracketed in the instruction.

Affirmative defense. Under some contracts, the plaintiff's performance of a contractual obligation is not made a condition precedent to the defendant's performance. For these contracts, the burden of proving whether the plaintiff breached the contract rests with the defendant, rather than the plaintiff, as an affirmative defense. See Wlasiuk v. Whirlpool Corp., 81 Wn.App. 163, 178–79, 914 P.2d 102 (1996); DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice § 10:3 (3d ed.).

With regard to paragraph (6), see the portion of the Comment to WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim) related to damages as a substantive element of plaintiff's case.

[Current as of April 2021.]

WPI 300.03

BURDEN OF PROOF ON THE ISSUES—BREACH OF CONTRACT—WITH AFFIRMATIVE DEFENSES

(Name of plaintiff) has the burden of proving each of the following propositions on [his] [her] [its] claim of breach of contract:

[(1)] That (name of defendant) entered into a contract with (name of plaintiff);

[(2)] [That the terms of the contract included:

(Insert a general statement of material terms);]

[(3)] [That (name of defendant) breached the contract [as] [in one or more of the ways] claimed by (name of plaintiff);]

[(4)] [That (name of plaintiff) [was not in [material] breach of] [had performed or offered to perform its obligations under] [was excused from performing its obligations under] the contract;]

[(5)] [That (insert any condition precedent the occurrence of which plaintiff must prove) had occurred;] [and]

[(6)] [That (name of plaintiff) was damaged as a result of (name of defendant's) breach].

If you find from your consideration of all the evidence that any of these propositions has not been proved, your verdict should be for (name of defendant). On the other hand, if each of these propositions has been proved, then you must consider the affirmative defense[s] claimed by (name of defendant).

(Name of defendant) has the burden of proving the following affirmative defense[s]:

(Here set forth the necessary elements of any affirmative defenses that are at issue.)

If you find from your consideration of all the evidence that [this affirmative defense has] [one or more of these affirmative defenses have] been proved, your verdict should be for (name of defendant) **[on this claim]. On the other hand, if [this affirmative defense has not] [none of these affirmative defenses have] been proved, then your verdict should be for** (name of plaintiff) **[on this claim].**

NOTE ON USE

Use this instruction when the defendant responds to the plaintiff's breach of contract claim with one or more affirmative defenses. If the defendant has not raised an affirmative defense, use WPI 300.02 (Burden of Proof on the Issues—Breach of Contract—No Affirmative Defense).

The instruction will need to be revised if the contract claim is being brought by a party other than the plaintiff.

Use this instruction with WPI 300.01 (Issues—Breach of Contract—Damages), when the defendant has raised at least one affirmative defense that presents an issue for the jury.

Regarding use of paragraphs (4) and (5), see the Note on Use and Comment to WPI 300.02 (Burden of Proof on the Issues—Breach of Contract—No Affirmative Defense). Regarding paragraph (6), see the discussion of actual damages versus nominal damages in the Comment to WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim).

The last paragraph of this instruction is patterned after WPI 21.05 (Burden of Proof on the Issues—Affirmative Defenses Other Than Contributory Negligence/Assumption of Risk). It assumes that the affirmative defense is a complete bar to recovery. When that is not the case, the paragraph must be modified accordingly.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence), when the case involves only issues that require proof by a preponderance of evidence. When the case also involves issues, such as fraud, that require proof by clear, cogent, and convincing evidence, use this instruction with WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence).

When the case involves a counterclaim for damages by defendant, set forth the alternative findings as in WPI 21.04 (Burden of Proof on the Issues—Counterclaim), adapted for a contract action.

When the affirmative defense goes to the enforceability of the contract, it may be appropriate to use this instruction in combination with WPI 301.08 (Enforceability—Mutual Mistake), WPI 301.09 (Enforceability—Unilateral Mistake), WPI 301.10 (Enforceability—Duress), or WPI 301.11 (Enforceability—Undue Influence). When the affirmative defense excuses or discharges the duty of performance, it may be appropriate to use this instruction in combination with an appropriate instruction as set forth in WPI Chapter 302 (Contracts—Performance and Breach), including WPI 302.07 (Excuse of Performance—Waiver), WPI 302.06 (Excuse of Performance—Estoppel), WPI 302.08 (Excuse of Performance—Interference With Contractual Performance), and WPI 302.09 (Excuse of Performance—Impossibility or Impracticability).

COMMENT

See the Comment to WPI 300.02 (Burden of Proof—Breach of Contract—No Affirmative Defense) for discussion of portions of the instruction related to the plaintiff's case.

Affirmative defenses listed in CR 8(c) include accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, payment and release, res judicata, statute of frauds, statute of limitation, and waiver.

Generally, such defenses can be divided into those that affect the enforceability of the contract, and those that discharge the duty of the defendant to perform under the contract.

Affirmative defenses affecting enforceability. Included among those that arise during the contracting phase, and affect the enforceability of the contract, are mutual or unilateral mistake, duress or undue influence, fraud or misrepresentation, illegality, statute of frauds, statute of limitations, and lack of competency or capacity. While these issues may be raised just as easily by plaintiffs seeking rescission of a contract as by defendants seeking avoidance of a contract, they are considered here in the role of affirmative defenses. See generally the instructions and Comments in WPI Chapter 301 (Contracts—Formation, Interpretation and Enforceability), including WPI 301.08 (Enforceability—Mutual Mistake), WPI 301.09 (Enforceability—Unilateral Mistake), WPI 301.10 (Enforceability—Duress), and WPI 301.11 (Enforceability—Undue Influence).

When fraud is asserted as an affirmative defense, there must be evidence of the nine elements required to prove fraud, as set forth in WPI 160.01 (Elements of Fraud). See Lambert v. State Farm Mut. Auto. Ins. Co., 2 Wn.App. 136, 141, 467 P.2d 214 (1970).

Affirmative defenses discharging or excusing performance. Other affirmative defenses arise out of conditions or events occurring during or affecting the course of performance, and are said to discharge or excuse a party's duty of performance. Just as with defenses that go to enforceability, when the party asserting the discharge or excuse is a defendant, then it is appropriate to term such claims affirmative defenses, but it should be noted that they might equally be asserted by the party bringing the action. These include laches or estoppel, waiver, prevention or hindrance of performance, or failure of consideration. See generally the instructions and Comments in WPI Chapter 302 (Contracts—Performance and Breach), including WPI 302.06 (Excuse of Performance—Estoppel), WPI 302.07 (Excuse of Performance—Waiver), WPI 302.08 (Excuse of Performance—Interference with Contractual Performance), WPI 302.09 (Excuse of Performance—Impossibility or Impracticability), and WPI 302.10 (Excuse of Performance—Frustration of Purpose). Subsequent conduct, such as accord and satisfaction, would also be included in this category.

Materiality of breach. For a discussion of this issue, see the Comment to WPI 300.02 (Burden of Proof on the Issues—Breach of Contract—No Affirmative Defense).

[Current as of April 2021.]

CHAPTER 301

CONTRACTS—FORMATION, INTERPRETATION, AND ENFORCEABILITY

WPI 301.01 Contract Defined
WPI 301.02 Promise Defined
WPI 301.03 Mutual Assent
WPI 301.04 Consideration
WPI 301.05 Contract Interpretation
WPI 301.06 Parol Evidence
WPI 301.07 Contract Modification
WPI 301.08 Enforceability—Mutual Mistake
WPI 301.09 Enforceability—Unilateral Mistake
WPI 301.10 Enforceability—Duress
WPI 301.11 Enforceability—Undue Influence

WPI 301.01

CONTRACT DEFINED

A contract is a legally enforceable promise or set of promises. [In order for a promise or set of promises to be legally enforceable, there must be [mutual assent] [and] [consideration].]

NOTE ON USE

Use this instruction when the existence of a contract or its terms is at issue. This instruction will ordinarily be given with WPI 300.01 (Issues—Breach of Contract—Damages) or 300.01.01 (Issues—Contract—Alternative), which would set forth the statement of claims.

The entire second sentence, and each of the terms "mutual assent" and "consideration," are in brackets to indicate that it may or may not be appropriate to present these terms to the jury, depending upon the issues in the case. If the second sentence is given, and mutual assent is an issue, use the term "mutual assent" in the second sentence and use this instruction together with WPI 301.03 (Mutual Assent). If the second sentence is given, and consideration is an issue, use "consideration" in

that sentence and use this instruction together with WPI 301.04 (Consideration).

When the jury must decide whether a promise has been made, use this instruction with WPI 301.02 (Promise Defined). When it is contended that a promise should be enforceable on the basis of promissory estoppel rather than consideration, see the Comment to WPI 301A.01 (Promissory Estoppel).

COMMENT

The Restatement (Second) of Contracts § 1 (1981) provides: "A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law recognizes as a duty." An agreement, on the other hand, "is a manifestation of mutual assent by two or more persons to one another," and "has a wider meaning than contract, bargain or promise." Corbit v. J. I. Case Co., 70 Wn.2d 522, 531, 424 P.2d 290 (1967) (quoting Restatement (First) of Contracts § 3 cmt. a (1932)).

A unilateral contract consists of a promise only on the part of the offeror, and performance of the required terms by the offeree. Storti v. Univ. of Wash., 181 Wn.2d 28, 330 P.3d 159 (2014) (trial court properly found that unilateral contract between university and professor had not been breached); Cascade Auto Glass, Inc. v. Progressive Cas. Ins. Co., 135 Wn.App. 760, 145 P.3d 1253 (2006) (trial court properly enforced unilateral modification to terminable-at-will contract; otherwise contract would be illusory).

[Current as of April 2021.]

WPI 301.02

PROMISE DEFINED

A promise is an expression that justifies the person to whom it is made in reasonably believing that a commitment has been made that something specific will happen or not happen in the future. A promise may be expressed orally, in writing, or by conduct.

NOTE ON USE

Use this instruction with WPI 301.01 (Contract Defined) when the formation of the contract has been put at issue by the pleadings and the evidence, and the jury must decide whether a promise has been made. When the jury must decide whether a promise has been made in order to support a finding of promissory estoppel, use this instruction with WPI 301A.01 (Promissory Estoppel).

COMMENT

The instruction is derived from sections 2(1) and 4 of the Restatement (Second) of Contracts (1981).

In contract law, the word "promise" is a term of art. Hansen v. Virginia Mason Med. Ctr., 113 Wn.App. 199, 207, 53 P.3d 60 (2002). The definition of a promise in the first Restatement of Contracts section 2(1) (1932), has been approved by Washington courts: "A promise is an undertaking, however expressed, either that something shall happen, or that something shall not happen, in the future." Hansen, 113 Wn.App. at 207; Meissner v. Simpson Timber Co., 69 Wn.2d 949, 957, 421 P.2d 674 (1966); Plumbing Shop, Inc. v. Pitts, 67 Wn.2d 514, 517, 408 P.2d 382 (1965).

The current edition of the Restatement provides: "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Restatement (Second) of Contracts § 2(1) (1981), cited in Hansen, 113 Wn.App. at 207, and Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 172, 876 P.2d 435 (1994). This emphasis on the justifiable understanding of the promisee is reflected in the wording of the instruction. The Restatement (Second) of Contracts also provides: "A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct." Restatement (Second) of Contracts § 4 (1981).

A promise is distinguished from an intention to do a thing. Meissner, 69 Wn.2d at 957; see also Pac. Cascade Corp. v. Nimmer, 25 Wn.App. 552, 608 P.2d 266 (1980). A promise, in the sense of a commitment, is also to be distinguished from a description of a future event. Hansen, 113 Wn.App. at 207; Peoples Mortg. Co. v. Vista View Builders, 6 Wn.App. 744, 496 P.2d 354 (1972).

An "illusory promise" is "a purported promise that actually promises nothing because it leaves to the speaker the choice of performance or nonperformance." It is "neither enforceable nor sufficient consideration to support enforcement of a return promise." Interchange Assocs. v. Interchange, Inc., 16 Wn.App. 359, 360–61, 557 P.2d 357 (1976). This includes the reservation of an absolute right to cancel a promised performance. Interchange Assocs., 16 Wn.App. at 360. Cf. Omni Grp., Inc. v. Seattle-First Nat'l Bank, 32 Wn.App. 22, 645 P.2d 727 (1982) (right to cancel on occurrence of specified condition does not render promise illusory).

A "supposed promise may be illusory because it is so indefinite that it cannot be enforced, or by reason of provisions contained in the promise which make its performance optional or entirely discretionary by the promisor." Goodpaster v. Pfizer, Inc., 35 Wn.App. 199, 203, 665 P.2d 414 (1983). Similarly, an agreement to negotiate a contract in the future "is nothing more than negotiations." Wharf Rest., Inc. v. Port of Seattle, 24 Wn.App. 601, 608, 605 P.2d 334 (1979). "Agreements to agree are unenforceable in Washington." P.E. Sys., LLC v. CPI Corp., 176 Wn.2d 198, 208, 289 P.3d 638 (2012).

Washington courts have analyzed contracts in which a promise is manifested by conduct as "implied contracts," or as contracts or contract terms "implied in fact." See Johnson v. Whitman, 1 Wn.App. 540, 463 P.2d 207 (1969) (distinguishing quasi contract, "implied in law," which is based on implied legal duties or obligations):

> A true implied contract, or contract implied in fact, is an agreement which depends for its existence on some act or conduct of the party sought to be charged, and arises by inference or implication from circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention on the part of the parties to contract with each other.

Johnson, 1 Wn.App. at 544–45 (quoting Ross v. Raymer, 32 Wn.2d 128, 137, 201 P.2d 129 (1948)); see also Pierce Cnty. v. State, 144 Wn.App. 783, 185 P.3d 594 (2008); see WPI 301A.02 (Quasi Contract).

The existence of an implied contract is a question for the trier of

fact. Lokan & Assocs., Inc. v. Am. Beef Processing, LLC, 177 Wn.App. 490, 311 P.3d 1285 (2013); Weiss v. Lonnquist, 153 Wn.App. 502, 224 P.3d 787 (2009) (trial court properly inferred existence of subsequent employment contract); see also Kilthau v. Covelli, 17 Wn.App. 460, 462, 563 P.2d 1305 (1977). The courts also note, however, that "the types of contract, express and implied, simply differ in the mode of proof and not in terms of their legal consequences." Plumbing Shop, 67 Wn.2d at 517 n.1; Eaton v. Engelcke Mfg., Inc., 37 Wn.App. 677, 680, 681 P.2d 1312 (1984). Therefore, the instruction does not introduce the term "implied contract" to the jury.

[Current as of April 2021.]

WPI 301.03

MUTUAL ASSENT

In order for there to be mutual assent, the parties must agree on the essential terms of the contract, and must express to each other their agreement to the same essential terms.

NOTE ON USE

Use this instruction in combination with WPI 301.01 (Contract Defined), when the existence of a contract is at issue. Depending upon the issues in the case, the jury may need further instruction as to "essential terms" and their relationship to the parties' intention to form a contract.

In some cases, the instruction will need to be modified to set forth the particulars of offer and acceptance. See the Comment below.

COMMENT

Formation of a valid contract requires that the parties objectively express a mutual agreement as to the contract's material terms. See, e.g., P.E. Sys., LLC v. CPI Corp., 176 Wn.2d 198, 209, 289 P.3d 638 (2012); Yakima Cnty. (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 388, 858 P.2d 245 (1993); Hansen v. Transworld Wireless TV-Spokane, Inc., 111 Wn.App. 361, 370, 44 P.3d 929 (2002). Mutual assent is required only as to the agreement's material terms:

> Almost never are all the connotations of a bargain exactly identical for both parties; it is enough that there is a core of common meaning sufficient to determine their performances with reasonable certainty or to give a reasonably certain basis for an appropriate legal remedy.

Trendwest Resorts, Inc. v. Ford, 103 Wn.App. 380, 388, 12 P.3d 613 (2000) (quoting Restatement (Second) of Contracts § 20 cmt. b (1979)), reversed on other grounds, 146 Wn.2d 146, 43 P.2d 1223 (2002). For an overview of the issues involved in mutual assent, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice §§ 2:7 through 2:10 (3d ed.).

In most cases, the instruction will not need to be supplemented with more specific principles relating to offer and acceptance. Jurors do

not usually need to focus on the legal details of offer and acceptance when deciding whether there has been an objectively expressed meeting of the minds. For those cases in which these legal details would assist jurors in their deliberations, practitioners will need to draft additional instructions that are tailored to the issues involved in the particular case.

Jurors could be instructed with definitions of offer and acceptance and other applicable principles, such as the law relating to an offer's duration, an offer's withdrawal, an offer's rejection, methods of acceptance, and option contracts. These issues, although too numerous and fact-specific to be converted into generally applicable pattern instructions, are discussed in DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice §§ 2:11 through 2:22 (3d ed.).

[Current as of April 2021.]

WPI 301.04

CONSIDERATION

If you find (set forth the facts the court has determined would be sufficient to establish consideration), **then there was consideration.**

NOTE ON USE

This instruction is to be used in combination with WPI 301.01 (Contract Defined) when the issue of consideration presents a question of fact for jury determination.

The legal sufficiency of consideration will ordinarily be a question for the court. If the adequacy of consideration becomes an issue (see the Comment below), it will be a question for the trier of fact, and the instruction should be modified accordingly.

When it is asserted that promissory estoppel is an alternative to consideration, use WPI 301A.01 (Promissory Estoppel). See the Comment to WPI 301A.01 (Promissory Estoppel).

COMMENT

According to Washington courts, "[c]onsideration is any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange." Labriola v. Pollard Grp., Inc., 152 Wn.2d 828, 833, 100 P.3d 791 (2004) (quoting King v. Riveland, 125 Wn.2d 500, 505, 886 P.2d 160 (1994)); Citizens for Des Moines, Inc. v. Petersen, 125 Wn.App. 760, 106 P.3d 290 (2005) (trial court erroneously found contract where no consideration was exchanged).

"[B]efore any act or promise or forbearance can constitute a consideration [for a promise], it must be bargained for and given in exchange for the promise." Williams Fruit Co. v. Hanover Ins. Co., 3 Wn.App. 276, 281, 474 P.2d 577 (1970). See Restatement (Second) of Contracts § 71(1) (1981). According to the Restatement, "[a] performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." Restatement (Second) of Contracts § 71(2) (1981).

"[W]hether a contract is supported by consideration is a question of law and may be properly determined by a court on summary judgment." Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wn.2d 178, 195, 840 P.2d 851 (1992); Lokan & Assocs., Inc. v. Am. Beef Processing, LLC., 177 Wn.App 490, 311 P.3d 1285 (2013).

Courts generally "do not inquire into the adequacy of consideration, but employ a legal sufficiency test." King Cnty. v. Taxpayers of King Cnty., 133 Wn.2d 584, 597, 949 P.2d 1260 (1997). "Legal sufficiency is concerned not with comparative value but with that which will support a promise." Taxpayers of King Cnty., 133 Wn.2d at 597 (quoting Browning v. Johnson, 70 Wn. 2d 145, 147, 422 P.2d 314, amended, 70 Wn. 2d 145, 430 P.2d 591 (1967)). "[A]nything which fulfills the requirements of consideration will support a promise whatever may be the comparative value of the consideration, and of the thing promised." Browning, 70 Wn.2d. at 147 (quoting 1 Williston on Contracts § 115).

For an extended discussion of Washington's case law on consideration, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice §§ 2:23–:26 (3d ed.).

[Current as of June 2021.]

WPI 301.05

CONTRACT INTERPRETATION

A contract is to be interpreted to give effect to the intent of the parties at the time they entered the contract.

You are to take into consideration all the language used in the contract, giving to the words their ordinary meaning, unless the parties intended a different meaning.

You are to determine the intent of the contracting parties by viewing the contract as a whole, considering the subject matter and apparent purpose of the contract, all the facts and circumstances leading up to and surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations offered by the parties.

NOTE ON USE

Use this instruction when the jury must decide the intended meaning of contract language.

COMMENT

The content of the instruction is derived from Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990), and subsequent cases. See Miller v. Kenny, 180 Wn.App. 772, 796, 325 P.3d 278 (2014) (discussing WPI 301.05). For discussions of appellate applications of *Berg*, see Tegland, 5C Washington Practice, Evidence Law and Practice, ch. 12, especially § 1200.13 (6th ed.), and DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice §§ 5:2, 5:5, 5:6 (3d ed.).

In *Berg*, Washington rejected the "plain meaning rule," which would exclude the use of extrinsic evidence to determine the meaning of language that was "plain and unambiguous on its face." The court instead adopted the "context rule," under which "[a]ny determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties."

Berg, 115 Wn.2d at 667 (quoting Restatement (Second) of Contracts § 212 cmt. b (1981)). The court adopted the Restatement (Second) of Contracts § 212 (1981), which provides:

> (1) The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter.
>
> (2) A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.

Despite *Berg's* apparent emphasis on the underlying intent of the parties in the "context rule," the Supreme Court has subsequently reaffirmed that "Washington continues to follow the objective manifestation theory of contracts. Under this approach, we attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

Extrinsic evidence "is admitted for the purpose of aiding in the interpretation of what is in [a written] instrument, and not for the purpose of showing intention independent of the instrument." Berg, 115 Wn.2d at 669. The "relevant intention of a party is that manifested by him rather than any different undisclosed intention." Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wn.2d 678, 684, 871 P.2d 146 (1994) (quoting the Restatement (Second) of Contracts § 212 cmt. a (1965)). See also the related discussion of the parol evidence rule, Comment to WPI 301.06 (Parol Evidence).

The court in *Berg* went to some lengths to adopt a distinction made by A. Corbin, 3 Corbin on Contracts § 534 (1960), between contract "interpretation" and contract "construction." Berg, 115 Wn.2d at 663. The former, according to the court, relates to the meanings given by persons to symbols of expression, while the latter is concerned with the "legal consequences" of contract terms. The court later clarified that the "special and specific rules of interpretation" governing insurance contracts, at least, "were not changed by the *Berg* holding." Lynott, 123 Wn.2d at 683.

The Restatement (Second) of Contracts (1981) contains a number of

comparable provisions of general contract application that are characterized by the Restatement (Second) as "[s]tandards of preference among reasonable meanings." Restatement (Second) of Contracts § 212 cmt. b (1981). These include section 203 (Standards of Preference in Interpretation) described in the comment as not overriding the meaning of the parties. They also include, however, section 206 (Interpretation Against the Draftsman) and section 207 (Interpretation Favoring the Public), which are each described as rules of construction and of interpretation. Insofar as such rules are an aid to interpretation, they should be incorporated in this instruction as applicable.

When interpretation depends upon the use of extrinsic evidence, and more than one reasonable inference can be drawn from the extrinsic evidence, interpretation of the contract presents a question of fact, not law. SAS Am., Inc. v. Inada, 71 Wn.App. 261, 266, 857 P.2d 1047 (1993). According to the Restatement (Second) of Contracts § 212 cmt. d (1981):

> Analytically, what meaning is attached to a word or other symbol by one or more people is a question of fact. But general usage as to the meaning of words in the English language is commonly a proper subject of judicial notice without the aid of evidence extrinsic to the writing.

[Current as of April 2021.]

WPI 301.06

PAROL EVIDENCE

If you find that all of the provisions of an agreement between (name of plaintiff) and (name of defendant) are contained in a single written document, and that the document was intended by the parties as their final agreement on the subjects addressed in it, then you may not consider evidence outside the written document to add to, subtract from, vary, or contradict that written document [unless you also find that terms were included in the document as the result of fraud or mutual mistake].

However, if you find that such written document was not intended to be a complete expression of all of the terms agreed upon by those parties, that is, that the document does not contain all of the terms of their agreement, then you may also consider evidence of the circumstances surrounding the making of the agreement to supply additional terms of the agreement between the parties, but only if they are not inconsistent with the provisions of the written document.

NOTE ON USE

Use this instruction with WPI 301.05 (Contract Interpretation) when there is a written contract and a factual issue exists as to whether the contract is integrated.

If there is a basis for a jury finding of an exception to this rule on the basis of fraud or mutual mistake, include the bracketed phrase and supplement the instruction with a clarifying instruction regarding the appropriate requirements and burdens of proof. See WPI Chapter 160 (Fraud). Regarding mutual mistake, see the Comment to WPI 301.08 (Enforceability—Mutual Mistake).

COMMENT

Overview. This instruction is used when a party alleges that the intent of a written contract is not what the opposing party claims it to be. In this context, "parol evidence" simply means oral testimony.

In broad outline, the purpose of the parol evidence rule is to implement the policy of enforcing written contracts, as written, preventing a party from later arguing that the written contract is not what the parties intended.

A dispute over the intent of a contract should not be confused with the issues presented when one party claims the parties executed a second contract intended to replace the first contract. When the issue is whether the first contract was replaced by a second contract, WPI 301.7 (Contract Modification) is used rather than WPI 301.06.

Preliminary determination that contract is integrated. The parol evidence rule does not apply until the court has determined that the written contract is integrated; i.e., that the contract expresses the final and complete agreement by the parties. This preliminary determination is summarized in Emrich v. Connell, 105 Wn.2d 551, 716 P.2d 863 (1986). In *Emrich*, the court said:

> [T]he parol evidence rule only applies to a writing intended by the parties as an "integration" of their agreement; *i.e.*, a writing intended as the final expression of the terms of the agreement. In making this preliminary determination of whether the parties intended the written document to be an integration of their agreement, which is a question of fact, the trial court must hear all relevant, extrinsic evidence, oral or written. If, after hearing all the evidence, the court determines that the writing is the final and complete expression of the parties' agreement—*i.e., completely integrated*—then the extrinsic evidence is disregarded.

Emrich, 105 Wn.2d at 556.

When the evidence would support a jury finding that a set of written documents, rather than a single written document, constituted an integrated agreement, the instruction should be modified accordingly.

The parol evidence rule. The current parol evidence rule in Washington was summarized by the Supreme Court in Hollis v. Garwall, 137 Wn.2d 683, 695, 974 P.2d 836 (1999). In *Hollis*, the court said in a dispute arising out of a written contract, the parol evidence rule bars:

(1) Evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term; and

(2) Evidence that would show an intention independent of the instrument; and

(3) Evidence that would vary, contradict or modify the written word.

Effect of Berg v. Hudesman. A 1990 case, Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990), seemed to signal a departure from the general rules summarized above. The most controversial portion of *Berg* was a statement by the court that parol evidence is admissible to show the intent of the contract even if the contract is not ambiguous on its face.

Over the years, however, the courts, including the Supreme Court, have signaled disapproval of *Berg*, without ever overruling *Berg*. It is now safe to say that the controversial portions of *Berg* have been abandoned, and that the traditional rules summarized above continue to be controlling. Tegland, 5C Washington Practice, Evidence Law and Practice § 1200.13 (6th ed.); see also Miller v. Kenny, 180 Wn.App. 772, 796, 325 P.3d 278 (2014) (discussing WPI 301.06).

Cross-references. The foregoing is only a brief summary of the substantive law underlying WPI 301.06. For a detailed analysis of the law, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice ch. 4 (3d ed.); Tegland, 5C Washington Practice, Evidence Law and Practice ch. 12 (6th ed.).

[Current as of April 2021.]

WPI 301.07

CONTRACT MODIFICATION

Once a contract has been entered into, mutual assent of the contracting parties is essential for any modification of the contract.

To establish a modification, the party asserting the modification must show, through the [words] [or] [conduct] of the parties, that there was an agreement of the parties on all essential terms of the contract modification, and that the parties intended the new terms to alter the contract.

NOTE ON USE

Use this instruction when there is a jury issue of contract modification. If, under the circumstances, the court determines that consideration is required for a claimed contract modification, and that there is a factual issue regarding such consideration, this instruction should be modified accordingly. See the Comment below. It may also be necessary to use WPI 301.04 (Consideration), which incorporates the court's determination of what constitutes consideration.

Use the bracketed words as appropriate to the type of evidence of modification that is offered.

COMMENT

Overview. This instruction is used when a party alleges that an existing contract was later modified by the parties, and the evidence presented is sufficient to submit the issue to the jury.

A claim that a contract was later modified by the parties should not be confused with the issues presented when one or both of the parties acknowledge that only one contract exists, but the parties disagree about the intent of certain terms within the contract. When the issue is intent rather than modification, WPI 301.06 (Parol Evidence) is used rather than WPI 301.07.

Claim of modification, burden of proof. It is often said that "[m]utual modification of a contract by subsequent agreement arises out of the intentions of the parties and requires a meeting of the minds."

Ebling v. Gove's Cove, Inc., 34 Wn.App. 495, 499, 663 P.2d 132 (1983); see also Wagner v. Wagner, 95 Wn.2d 94, 621 P.2d 1279 (1980) (no modification of separation agreement); Tondevold v. Blaine Sch. Dist. No. 503, 91 Wn.2d 632, 590 P.2d 1268 (1979) (attempt by employer to reinstate contract provision deleted by mutual agreement was void and of no effect); MacDonald v. Hayner, 43 Wn.App. 81, 715 P.2d 519 (1986) (promise to renegotiate payment for services did not constitute promise to modify payment).

According to older cases, an *oral* modification of a written contract must be shown by clear and convincing evidence. See Tonseth v. Serwold, 22 Wn.2d 629, 644, 157 P.2d 333 (1945); Dinsmore Sawmill Co. v. Falls City Lumber Co., 70 Wash. 42, 44, 126 P. 72 (1912); see generally 17B C.J.S. Contracts § 755 (1999). Modern authority from elsewhere is divided.

Some states continue to require clear and convincing evidence. See, e.g., Sokol & Assocs., Inc. v. Techsonic Indus., Inc., 495 F.3d 605 (8th Cir. 2007) (under Minnesota law, a party asserting the parol modification of a written contract has the burden of proving the modification by clear and convincing evidence). Others require only a preponderance of the evidence to establish contract modification. See, e.g., Barrett v. Bank of Am., 183 Cal.App.3d 1362, 229 Cal.Rptr. 16 (Cal. Ct. App. 1986) (trial court erred in requiring clear and convincing evidence).

Consideration. Generally, a modification requires consideration, or a mutual change in obligations and rights. Wagner, 95 Wn.2d 94; Rosellini v. Banchero, 83 Wn.2d 268, 517 P.2d 955 (1974); Dragt v. Dragt/DeTray, LLC, 139 Wn.App. 560, 576, 161 P.3d 473 (2007); Ebling, 34 Wn.App. at 499. While consideration may be "any bargained for act or forbearance," Dragt, 139 Wn.App. at 572, it must be something separate from what was promised in the original contract. Dragt, 139 Wn.App. at 560 (trial court erred in enforcing contract modification where separate consideration was not shown).

Depending on the facts and which issues are disputed, it may be possible for counsel to argue that the agreement to a new contract replacing the old contract is, itself, sufficient consideration to support the formation of the new contract. DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice § 11.3 (3d ed.), and authorities cited therein.

Cross-reference. The foregoing is only a brief summary of the substantive law underlying WPI 301.07. For a detailed analysis of the law, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice ch. 11 (3d ed.).

Effect of parol evidence rule. As mentioned above, the parol evidence rule (see WPI 301.06) comes into play when one or both parties agree that only one contract exists, but the parties disagree on the intent of that contract. The parol evidence rule does not restrict proof that the parties later formed a new contract, even if the new contract is inconsistent with the first contract. DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice § 4.6 (3d ed.).

As a result, the parol evidence rule would normally not apply in a case in which the issue is whether the parties formed a new contract to replace a previous contract. The parol evidence rule would become applicable only if both parties agree that a new contract was formed, but disagree on the intent of certain terms in the new contract.

For a more detailed discussion of the parol evidence rule, see the Comment to WPI 301.06.

[Current as of April 2021.]

WPI 301.08

ENFORCEABILITY—MUTUAL MISTAKE

A party may rescind a contract on the ground of mutual mistake if the party proves by clear, cogent, and convincing evidence that

(1) both parties were independently mistaken as to a basic assumption regarding existing facts, upon which the party seeking to rescind relied in making the contract, and

(2) the mistake changed the bargain so much that the party seeking to rescind would not have entered into the contract if the party had been aware of the mistake.

In addition, the party seeking to rescind a contract has the burden of proving by a preponderance of the evidence that the party does not bear the risk of mistake. [This means that a party cannot rescind a contract on the ground of mutual mistake if the party was aware, at the time the contract was made, that the party had only limited knowledge of the facts but chose to treat that knowledge as sufficient] [(other factors bearing on the risk of mistake)].

NOTE ON USE

Use this instruction when mutual mistake is asserted as an affirmative defense to the enforcement of a contract. When rescission of a release is involved, see the Comment below.

This instruction does not apply when mutual mistake is used as the basis to reform a contract. Because reformation is an equitable remedy, no separate instruction is offered on mutual mistake as a basis for reformation.

Use the bracketed material in the instruction's final paragraph as necessary to address factors bearing on the risk of mistake.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—

Preponderance of the Evidence) and the second paragraph of WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence).

For a discussion of issues relating to independence of mistake, see the Comment below.

Parties and the court may want to customize the wording of the instruction to fit the participants and the facts of a given case. Care should be taken to avoid commenting on the evidence.

COMMENT

Background. The grounds for mutual mistake as a defense to the enforcement of the contract are the same as those for the remedy of rescission. As an equitable remedy, rescission would not ordinarily be presented for jury determination. On the other hand, mutual mistake may well be presented as a defense to a breach of contract action, and in this context of a case with both legal and equitable issues, the court may decide to present the question to the jury.

It should be noted that the requirements for mutual mistake that may form the basis of reformation of a contract are distinct from those that form the basis for an affirmative defense to the enforcement of a contract. See Comment to WPI 301.06 (Parol Evidence); see also Leonard v. Wash. Emp., Inc., 77 Wn.2d 271, 461 P.2d 538 (1969).

Restatement. This instruction is based on the Restatement (Second) of Contracts § 152, and its comments, together with section 154(b), as well as Washington cases.

According to the Restatement (Second) of Contracts § 152(1) (1981):

> Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.

Under the Restatement (Second) of Contracts analysis, a "mistake" is a "belief that is not in accord with the facts." Restatement (Second) of Contracts § 151 (1981); Simonson v. Fendell, 101 Wn.2d 88, 91, 675 P.2d 1218 (1984). The "erroneous belief must relate to the facts as they exist at the time of the making of the contract. A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a 'mistake' as the word is used here." Restatement (Second) of Contracts § 151 cmt. a (1981).

A "basic assumption on which both parties made the contract" is one that would not be within the ordinary risks related to uncertainty involved in typical business transactions. Thus an erroneous assumption about the stability of market conditions or the financial situation of either of the parties would not ordinarily be considered a "basic assumption," but the erroneous assumption of the presence of timber or of a building on a parcel of land may be. Restatement (Second) of Contracts § 152 cmt. b, illus. 1, 5 (1981); see Pub. Util. Dist. No. 1 v. Wash. Pub. Power Supply Sys., 104 Wn.2d 353, 362, 705 P.2d 1195 (1985).

Material effect on exchange. The mistake must have a material effect on the agreed exchange of performance such that the "resulting imbalance . . . is so severe that [the party seeking to rescind] cannot fairly be required to carry it out." Restatement (Second) of Contracts § 152 cmt. c (1981). This does not need to rise to the level of unconscionability, however; ordinarily it will be sufficient to show that the exchange is not only less desirable to the party seeking to rescind the contract but also more advantageous to the other party. Restatement (Second) of Contracts § 152 cmt. c (1981); see Simonson, 101 Wn.2d 88 (materiality of mistake regarding profitability of business being sold).

Risk of mistake—Releases. A party bears the risk of mistake under section 154, and thus cannot avoid or rescind the contract, if the party is allocated the risk by the contract or, in the case more likely to arise for resolution by the trier of fact, when "he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient . . . ." Restatement (Second) of Contracts § 154(b) (1981); Tiegs v. Boise Cascade Corp., 83 Wn.App. 411, 426, 922 P.2d 115 (1996).

This provision has been applied to preclude rescission of a release executed by parties who were aware of their injuries, but not their extent, at the time of the release. Bennett v. Shinoda Floral, Inc., 108 Wn.2d 386, 395–97, 739 P.2d 648 (1987). Washington recognizes an exception, however, for parties with an unknown or latent injury at the time the release was executed, if they can prove "the release was not fairly and knowingly made." Del Rosario v. Del Rosario, 152 Wn.2d 375, 382–84, 97 P.3d 11 (2004) (citing Finch v. Carlton, 84 Wn.2d 140, 145–46, 524 P.2d 898 (1974); see also Pub. Util. Dist. No. 1, 104 Wn.2d at 362 ("A party who incurs an obligation with limited knowledge, conscious disregard of surrounding circumstances and awareness of uncertainty must bear the consequences of its decision."). But see Nevue v. Close, 123 Wn.2d 253, 255–56, 867 P.2d 635 (1994) (recognizing criticism of *Bennett*'s rationale, and applying the "fairly and knowingly made" exception of *Finch* to injuries that were unknown or latent to the parties at the time a boilerplate release was signed).

Independence of mistake. Washington cases also require, in the case of rescission, that the mistake of both parties be made independently by each, i.e., not relying on information obtained from the other. See Finch, 84 Wn.2d at 142, discussing Beaver v. Harris' Estate, 67 Wn.2d 621, 409 P.2d 143 (1965); Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wn.2d 178, 190, 840 P.2d 851 (1992) (releases, nature or extent of injuries suffered by releasors); see also Simonson, 101 Wn.2d at 91. Therefore the term "independently" is included in the instruction. For a case in which independence of mistake is a central issue, the instruction can be modified to explain this concept in more detail.

Burden of proof. Mutual mistake must be proved by clear, cogent, and convincing evidence. Denaxas v. Sandstone Ct. of Bellevue, L.L.C., 148 Wn.2d 654, 669, 63 P.3d 125 (2003); Nationwide, 120 Wn.2d at 189; Mutual of Enumclaw Ins. Co. v. Day, 197 Wn.App. 47, 64, 387 P.3d 1084 (2016); Urban v. Mid-Century Ins., 79 Wn.App. 798, 804, 905 P.2d 404 (1995) (clear and convincing evidence).

[Current as of April 2021.]

WPI 301.09

ENFORCEABILITY—UNILATERAL MISTAKE

A party may rescind a contract on the ground of unilateral mistake if the party proves by clear, cogent, and convincing evidence that

(1) the party was mistaken as to a basic assumption regarding existing facts, upon which the party relied in making the contract,

(2) the mistake changed the bargain so much that the party seeking to rescind would not have entered into the contract if the party had been aware of the mistake, and

(3) the other party knew or had reason to know of the mistake, or the other party's fault caused the mistake.

In addition, the party seeking to rescind a contract has the burden of proving by a preponderance of the evidence that the party does not bear the risk of mistake. [A party bears the risk of mistake if the party was aware at the time the contract was made that the party had only limited knowledge of the facts but chose to treat that knowledge as sufficient] [(other factors bearing on the risk of mistake)].

NOTE ON USE

Use this instruction when a party seeks to avoid enforcement of the contract on the basis of unilateral mistake. Include the last sentence if its provisions form the basis for the claim. If the claim is that enforcement of the contract would be unconscionable, this would be a determination for the court as a matter of law.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence) and the second paragraph of WPI 160.03 (Fraud—Burden of Proof—Combined With Preponderance of the Evidence).

COMMENT

Background. The grounds for unilateral mistake as a defense to the enforcement of the contract are the same as those for the remedy of rescission. As an equitable remedy, rescission would not ordinarily be presented for jury determination. On the other hand, unilateral mistake may well be presented as a defense to a breach of contract action. In the context of a case with both legal and equitable issues, the court may decide to present the question to the jury.

For a discussion of the definition of mistake and the requirements for mutual mistake, see the Comment to WPI 301.08 (Enforceability—Mutual Mistake). See Restatement (Second) of Contracts § 153 cmt. b (1981). Compare WPI 302.10 (Excuse of Performance—Frustration of Purpose).

Unilateral mistake has been recognized as a defense to a contract where the party asserting the defense can show that the other party either knew about the mistake or is charged with knowing of the mistake. Snap-on Tools Corp. v. Roberts, 35 Wn.App. 32, 35, 665 P.2d 417 (1983).

Unconscionability. The Restatement (Second) of Contracts section 153 (1981) also recognizes unconscionability as a basis for denying enforcement of a contract resulting from unilateral mistake. The "unconscionability" option has not been included in the instruction, because "whether particular facts render an agreement unconscionable is a question of law" for the court. Gill v. Waggoner, 65 Wn.App. 272, 828 P.2d 55 (1992). "An unconscionable contract is one which 'no man in his senses, not under delusion, would make . . . and which no fair and honest man would accept . . . .' " Gill, 65 Wn.App. at 278 (quoting Montgomery Ward & Co., Inc. v. Annuity Bd. of S. Baptist Convention, 16 Wn.App. 439, 444, 556 P.2d 552 (1976)).

Reason to know of mistake. Actual knowledge of the mistake is not required; the party seeking rescission or avoidance may show that "the other party to the contract knows of or is charged with knowledge of the mistake." Gill, 65 Wn.App. at 276; see also Basin Paving, Inc. v. Port of Moses Lake, 48 Wn.App. 180, 737 P.2d 1312 (1987); Snap-On Tools, 35 Wn.App. at 35; Appleway Leasing, Inc. v. Tomlinson Dairy Farms, Inc., 22 Wn.App. 781, 591 P.2d 1220 (1979). The Restatement (Second) of Contracts (1981) uses the phrase "reason to know," rather than "should know," because:

> "Should know" imports a duty to others to ascertain facts; [while] the words "reason to know" are used both when the actor has a duty to another and where he would not be acting adequately in the

> protection of his own interests were he not acting with reference to the facts which he has reason to know.

Restatement (Second) of Contracts § 19 cmt. b, referenced in § 153 cmt. e (1981).

Bids. In a series of cases involving relief from unilateral mistakes in the calculation of bids, either by avoiding forfeiture of a bid bond or enforcement of the contract itself, the courts have held that relief may be granted (a) if the bidder acted in good faith, (b) without gross negligence, (c) was reasonably prompt in giving notice of the error to the other party, and (d) will suffer substantial detriment, while the other party (e) has not changed position and will suffer no substantial hardship if the forfeiture is not exacted or the contract not enforced. Peter Kiewit Sons' Co. v. Wash. State Dep't of Transp., 30 Wn.App. 424, 429, 635 P.2d 740 (1981); Town of LaConner v. American Constr. Co., Inc., 21 Wn.App. 336, 585 P.2d 162 (1978).

Risk of mistake. Relief from a mistake is unavailable to one who bears the risk of mistake. Denaxas v. Sandstone Ct. of Bellevue, L.L.C., 148 Wn.2d 654, 63 P.3d 125 (2003). When the party seeking relief based on unilateral mistake had constructive knowledge of the true state of affairs, it is improper to treat the lack of knowledge as a "mistake" relieving that party from enforcement of the contract. Denaxas, 148 Wn.2d at 672; see also Tiegs v. Boise Cascade Corp., 83 Wn.App. 411, 426, 922 P.2d 115 (1996) ("[a] party who is aware he has only limited knowledge of the facts but treats his limited knowledge as sufficient, bears the risk of mistake").

Reformation of contract. As an alternative to rescission of the contract, a party may seek reformation of the contract in order to conform the writing to the actual agreement of the parties. Denaxas, 148 Wn.2d 654.

> A party to a contract is entitled to reformation of the contract based on one party's unilateral mistake only if the other party engaged in inequitable conduct. A party acts inequitably if it knowingly conceals a material fact from the other party and has a duty to disclose that knowledge to the other party.

Oliver v. Flow Intern. Corp., 137 Wn.App. 655, 664, 155 P.3d 140, 145 (2006); see also Wash. Mut. Sav. Bank v. Hedreen, 125 Wn.2d 521, 526, 886 P.2d 1121 (1994).

Burden of proof. A party alleging unilateral mistake must meet the standard of clear, cogent, and convincing evidence. See Kaufmann v.

Woodard, 24 Wn.2d 264, 269–70, 163 P.2d 606 (1945) (reformation of contract); Wilhelm v. Beyersdorf, 100 Wn.App. 836, 843, 999 P.2d 54 (2000) (reformation of contract); Cavanaugh v. Brewington, 3 Wn.App. 757, 758, 477 P.2d 644 (1970) (reformation of contract). This heightened burden of proof appears to apply whether the party is seeking to reform a contract or avoid its enforcement. On the other hand, the party seeking avoidance or reformation of a contract need only show by a preponderance of the evidence that such party does not bear the risk of mistake.

[Current as of June 2021.]

WPI 301.10

ENFORCEABILITY—DURESS

A party may rescind a contract on the ground of duress if the party proves by clear, cogent, and convincing evidence that the party agreed to the contract because of an improper threat by the other party that left no reasonable alternative.

A threat is improper if (select an appropriate phrase from the Comment below).

[A threat to exercise a legal right, made in good faith, is not improper.]

NOTE ON USE

Use this instruction when a party seeks to avoid enforcement of a contract on the basis of duress that does not involve physical force. If physical compulsion is claimed, see the Comment below.

If an issue of ratification by subsequent conduct is raised, or if duress is applied by a third party, the instruction should be modified accordingly. See the Comment below.

Include the last sentence, if applicable.

Use this instruction with the second paragraph of WPI 160.03 (Fraud—Burden of Proof—Combined With Preponderance of Evidence).

COMMENT

Background. This instruction is based generally on the Restatement (Second) of Contracts §§ 175–76 (1981).

Threat versus physical compulsion. Duress and undue influence both involve improper pressure during the bargaining process, which may form the basis for the pressured party to rescind or avoid enforcement of the contract. Cf. WPI 301.11 (Enforceability—Undue Influence). In the extreme, and relatively rare, case of physical compulsion of the conduct expressing assent to the contract, no contract is formed. See Restatement (Second) of Contracts § 174 (1981). In the more common instance of compulsion resulting from an improper threat,

duress will render a contract voidable by the victim. Restatement (Second) of Contracts § 175 (1981).

Improper threats. According to the Restatement (Second) of Contracts § 176(1) (1981), a threat is improper if:

(a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,

(b) what is threatened is a criminal prosecution,

(c) what is threatened is the use of civil process and the threat is made in bad faith, or

(d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.

A threat is also improper under section 176 (2) if the resulting exchange is not on fair terms and

(a) the threatened act would harm the recipient and would not significantly benefit the party making the threat,

(b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or

(c) what is threatened is otherwise a use of power for illegitimate ends.

This list broadens the formulation of the first Restatement, in which the primary focus was on whether a wrongful act compelled assent "without volition" or without the victim "exercising free will and judgment." Restatement (First) of Contracts § 492 (1932), as quoted in Pleuss v. City of Seattle, 8 Wn.App. 133, 137, 504 P.2d 1191 (1972); see, e.g., In re J.N., 123 Wn.App. 564, 95 P.3d 414 (2004) (adoption agreement was not a result of duress); In re Marriage of Wilson, 117 Wn.App. 40, 68 P.3d 1121 (2003) (trial court's rejection of duress was justified by evidence that parties were educated and represented by counsel); Matthews v. Wenatchee Heights Water Co., 92 Wn.App. 541, 963 P.2d 958 (1998) (reluctance or fear of financial embarrassment insufficient to establish duress).

As noted in comment b to section 175, the Restatement (Second) of Contracts has substituted the concept of "no reasonable alternative" for the former emphasis on lack of free will or volition. While Washington

courts have not so far explicitly adopted the newer approach, in the related area of "undue influence," the courts have followed the Restatement (Second) of Contracts in abandoning an "overcoming the will" analysis. Gerimonte v. Case, 42 Wn.App. 611, 615, 712 P.2d 876 (1986).

Legal right exercised in good faith. Many Washington cases hold that a "mere threat to exercise a legal right made in good faith" does not constitute duress. Pleuss, 8 Wn.App. at 137. This includes a threat of litigation. Red-Samm Mining Co., Inc. v. Port of Seattle, 8 Wn.App. 610, 508 P.2d 175 (1973). Such a threat is made in good faith "if made in the honest belief that valid grounds exist to justify the action threatened." Pleuss, 8 Wn.App. at 137; see Doernbecher v. Mutual Life Ins. Co. of New York, 16 Wn.2d 64, 132 P.2d 751 (1943).

Economic duress. In cases applying the first Restatement of Contracts section 492, Washington courts have held that to prove economic duress, or "business compulsion," the threat must involve serious business loss in a situation so immediate as to render resolution in court impractical, and the victim must prove that both the immediate pressure and the underlying vulnerability of the victim to such pressure were attributable to the offending party. Nord v. Eastside Ass'n Ltd., 34 Wn.App. 796, 798, 664 P.2d 4 (1983); Barker v. Walter Hogan Enterprises, Inc., 23 Wn.App. 450, 453, 596 P.2d 1359 (1979). Fear of financial embarrassment is insufficient to establish duress. Matthews, 92 Wn.App. at 554.

Third parties. The Restatement (Second) of Contracts section 175(2) provides that a contract may be voidable by a victim of duress applied by someone who is not a party to the transaction, but only if the other party to the transaction has not, in good faith and without reason to know of the duress, given value or materially relied on the contract. Restatement (Second) of Contracts § 175(2) (1981)

Ratification. Because duress renders a contract merely voidable, rather than void, subsequent conduct of the victim that ratifies the contract renders it no longer voidable. W. Wash. Cement Masons Health & Sec. Trust Funds v. Hillis Homes, Inc., 26 Wn.App. 224, 234, 612 P.2d 436 (1980).

Burden of proof. The burden of proof for a party seeking to rescind a contract due to duress is clear, cogent, and convincing evidence. In re J.N., 123 Wn.App. at 576–77.

[Current as of June 2021.]

WPI 301.11

ENFORCEABILITY—UNDUE INFLUENCE

A party may rescind a contract on the ground of undue influence if that party proves, by clear, cogent, and convincing evidence, that the party was unfairly persuaded to enter the contract by a person who [either] dominated [or had a confidential relationship with] the party.

[A person is in a confidential relationship with a party when the party is justified in assuming that the person would not act against the party's welfare. Such relationships include _____ and _____.]

(Fill in these blanks with the most pertinent or analogous relationship from the Comment below.)

Unfair persuasion is any means that would seriously impair the free and competent exercise of the party's judgment. In determining whether the persuasion was unfair, you may take into account such factors as the unfairness of the contract, if any, the availability of independent advice, and the experience or susceptibility of the party persuaded.

NOTE ON USE

Use this instruction when a party seeks to avoid enforcement of a contract on the basis of undue influence by the other party to the contract.

Use the bracketed portions relating to a confidential relationship when that is the basis for the claim. For examples of confidential relationships, e.g., parent and child, physician and patient, see the Comment below. If the undue influence is exercised by a third party, see the Comment below and modify the instruction accordingly. If an issue of ratification by subsequent conduct is raised, the instruction should be modified accordingly. See the Comment to WPI 301.10 (Enforceability—Duress).

Use this instruction with the second paragraph of WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence).

COMMENT

Background. This instruction is based primarily on the Restatement (Second) of Contracts § 177 (1981), which provides:

(1) Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.

(2) If a party's manifestation of assent is induced by undue influence by the other party, the contract is voidable by the victim.

(3) If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the undue influence either gives value or relies materially on the transaction.

Section 177 is cited and relied upon in In re Estate of Jones, 170 Wn.App. 594, 606–07, 287 P.3d 610 (2012), and Gerimonte v. Case, 42 Wn.App. 611, 614, 712 P.2d 876 (1986).

Third parties. If the party exercising the undue influence was not a party to the contract, application of this section will require modification of the instruction to reflect the additional requirements of the Restatement (Second) of Contracts section 177(3).

Confidential relationships. Application of undue influence principles first depends upon establishing a relationship in which the party seeking to block enforcement of the contract was either under the domination of another, or justifiably assumed that another would not act inconsistently with the party's welfare. According to comment (a) of the Restatement (Second) of Contracts section 177, relationships that "often fall within the rule" include parent and child, husband and wife, clergyman and parishioner, and physician and patient. "In each case it is a question of fact whether the relation is such as to give undue weight to the other's attempts at persuasion." Restatement (Second) of Contracts § 177 cmt. a (1981).

A "confidential relationship" has also been described as including those that historically have been considered fiduciary, such as trustee and beneficiary, principal and agent, partner and partner, attorney and client, as well as any relationship in which one party has "gained the

confidence of the other and purports to act or advise with the other's interest in mind." McCutcheon v. Brownfield, 2 Wn.App. 348, 356–57, 467 P.2d 868 (1970).

Unfair persuasion. According to the Restatement (Second) of Contracts § 177 cmt. b, when the required domination or relationship is present:

> [the] degree of persuasion that is unfair depends on a variety of circumstances. The ultimate question is whether the result was produced by means that seriously impaired the free and competent exercise of judgment. Such factors as the unfairness of the resulting bargain, the unavailability of independent advice, and the susceptibility of the person persuaded are circumstances to be taken into account . . ., but they are not in themselves controlling.

Restatement (Second) of Contracts § 177 cmt. b (1981)

Burden of proof. A number of cases hold that undue influence must be proved by clear, cogent, and convincing evidence. See e.g., Tecklenburg v. Wash. Gas & Elec. Co., 40 Wn.2d 141, 143, 241 P.2d 1172 (1952); In re Estate of Jones, 170 Wn.App. at 603; Endicott v. Saul, 142 Wn.App. 899, 176 P.3d 560 (2008). On the other hand, in deciding motions for summary judgment, although courts "must view the evidence presented through the prism of the substantive evidentiary burden," Woody v. Stapp, 146 Wn.App. 16, 22, 189 P.3d 807 (2008), it has been noted that the "existence of undue influence between persons in a confidential relationship is more readily inferred." Gerimonte, 42 Wn.App. at 616 (citing Estate of Randmel v. Pounds, 38 Wn.App. 401, 685 P.2d 638 (1984) (standard not applicable to summary judgment); McCutcheon v. Brownfield, 2 Wn.App. 348, 357, 467 P.2d 868 (1970) (inference)).

[Current as of June 2021.]

CHAPTER 301A

EQUITABLE ALTERNATIVES—PROMISSORY ESTOPPEL AND QUASI CONTRACT

WPI 301A.01 Promissory Estoppel
WPI 301A.02 Quasi Contract

WPI 301A.01

PROMISSORY ESTOPPEL

Promissory estoppel means that a person will be prevented (estopped) from denying liability for breaching his or her promise, when another person reasonably relied upon that promise and justice requires that the promise be enforced.

(Name of promisee) **claims promissory estoppel and has the burden of proving, by a preponderance of the evidence, each of the following:**

(1) That (name of promisor) **made a promise [of] [to]** (specify promise claimed)**;**

(2) That (name of promisor) **should reasonably have expected that promise to cause** (name of promisee or claimant) **to change position [by** (specify action or forbearance)**];**

(3) That (name of promisee or claimant) **actually did change position; [and]**

(4) That when (name of promisee or claimant) **changed position, [he] [she] [it] was relying on the promise of** (name of promisor)**, and was justified in doing so [; and]**

[(5) That injustice can be avoided only if the promise is enforced].

NOTE ON USE

The WPI Committee believes that because of the equitable nature of promissory estoppel, the issue will generally be decided by the court. However, if the issue is submitted to the jury it will generally be appropriate to devise specific factual questions for the jury to accompany this instruction. Whether an estoppel results from the established facts will then be a question for determination by the court, based on the jury's factual determinations. See the Comment. This instruction is included for use at the discretion of the trial court.

Item 5 is included in the instruction for completeness, but the court may wish to reserve this issue separately, in which case the item should be omitted from the instruction.

For equitable estoppel as a defense to a claim of breach, use WPI 302.06 (Excuse of Performance—Estoppel).

If promissory estoppel is asserted as an alternative to a finding of contract based on consideration, the instruction should be modified to clarify the alternatives for the jury.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

COMMENT

Role of the jury. The Washington State Supreme Court has not decided whether promissory estoppel is an appropriate issue to submit to a jury. However, in Kim v. Dean, 133 Wn.App. 338, 135 P.3d 978 (2006), the Court of Appeals analyzed this issue and held that there was no right to jury trial on a promissory estoppel claim based on the facts of the case before it. In *Kim*, the court found that a former employee had no right to a jury trial of his promissory estoppel action against a former employer over alleged promises that the employee would receive a portion of the proceeds when the employer's company was sold, because the claim was purely equitable notwithstanding the employee's request for money damages. The court reasoned that the claim was solely equitable because it was based on good faith reliance unsupported by consideration (historically an equitable cause of action) and because it did not present a quantifiable measure of damages but rather required the jury to balance the equities in arriving at a damage award.

In general, when an action is purely equitable in nature, there is no right to a jury trial, but where a case involves both legal and equitable issues, a court has wide discretion to submit some, all, or none of the legal issues to a jury. Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 617 P.2d 704 (1980). The history of the right to jury trial and the factors a court is to consider when determining whether the case is primarily equitable in nature or an action at law are discussed in two cases: Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 368, 617 P.2d 704 (1980), and State ex rel. Department of Ecology v. Anderson, 94 Wn.2d 727, 620 P.2d 76 (1980). In making this determination, the court has great discretion, the exercise of which will not be disturbed except for clear abuse of discretion. Brown, 94 Wn.2d at 368; see also Shepler Constr., Inc. v. Leonard, 175 Wn.App. 239, 306 P.3d 988 (2013) (doubt should be resolved in favor of a jury trial because of the Constitutional right).

Several Washington appellate opinions have considered issues involving jury instructions on promissory estoppel without addressing the issue of whether they presented equitable issues not properly submitted to the jury. E.g., Wright v. Miller, 93 Wn.App. 189, 201, 963 P.2d 934 (1998) (insufficient evidence of unequivocal promise to submit to jury); Havens v. C & D Plastics, Inc., 68 Wn.App. 159, 842 P.2d 975 (1992) (insufficient evidence to submit to jury), reversed in part on other grounds, 124 Wn.2d 158, 876 P.2d 435 (1994); Farm Crop Energy, Inc. v. Old Nat'l Bank of Wash., 38 Wn.App. 50, 685 P.2d 1097 (1984), reversed on other grounds, 109 Wn.2d 923, 750 P.2d 231 (1988) (Supreme Court noting that an instruction based on the Restatement (Second) of Contracts § 90(1) would have been "preferable" to the one used by the trial court); see also Clipse v. Com. Driver Servs., Inc., 189 Wn.App. 776, 795–97, 358 P.3d 464 (2015) (trial court improperly submitted promissory estoppel theory to jury when plaintiff failed to present evidence of a clear and definite promise giving rise to promissory estoppel).

An equitable issue may be submitted to a jury for resolution of factual questions, although its verdict will be advisory only unless both parties consent to be bound. State ex rel. Dep't of Ecology v. Anderson, 94 Wn.2d 727, 620 P.2d 76 (1980); Alpine Industs., Inc. v. Gohl, 30 Wn.App. 750, 637 P.2d 998 (1981). For example, in C & K Engineering Contractors v. Amber Steel Co., 23 Cal.3d 1, 587 P.2d 1136, 151 Cal.Rptr. 323 (Cal. 1978), the trial court denied defendant's request for a jury trial but empaneled an advisory jury to consider the issue of plaintiff's reasonable reliance on defendant's promise.

Elements of promissory estoppel. With regard to element (5), "if justice can be avoided only by enforcement of the promise," the Restatement (Second) of Contracts § 90 cmt. b (1981), notes that satisfaction of this requirement:

> may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.

See R. S. Bennett & Co., Inc. v. Econ. Mech. Industs., Inc., 606 F.2d 182, 186 (7th Cir. 1979) (in summary judgment context, avoiding injustice a matter of law, while satisfaction of other elements a question of fact). Compare with Kaiser Steel Corp. v. Frank Coluccio Constr. Co., 785 F.2d 656 (9th Cir. 1986) (upholding instruction requiring jury to determine whether injustice could be avoided only by an award of damages, when specific enforcement not possible).

The Restatement (Second) of Contracts § 90(1) (1981) provides:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy created for breach may be limited as justice requires.

In analyzing the application of section 90, the Washington courts have established five requirements for recovery in promissory estoppel: "(1) a promise which (2) the promisor should reasonably expect to cause the promisee to change position and (3) which does cause the promisee to change position (4) justifiably relying on the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise." King v. Riveland, 125 Wn.2d 500, 506, 886 P.2d 160 (1994); see also Corbit v. J. I. Case Co., 70 Wn.2d 522, 538, 424 P.2d 290 (1967); Sloma v. Wash. State Dep't of Ret. Sys. 12 Wn.App.2d 602, 459 P.3d 396, review denied 195 Wn.2d 1028 (2020); Corey v. Pierce Cnty. 154 Wn.App. 752, 768, 225 P.3d 367 (2010); Shaw v. Hous. Auth. of City of Walla Walla, 75 Wn.App. 755, 761, 880 P.2d 1006 (1994).

Promissory estoppel makes "a promise binding, under certain circumstances, without consideration in the usual sense of something bargained for and given in exchange. If the promisee's performance was requested at the time the promisor made his promise and that performance was bargained for, the doctrine is inapplicable." Greaves v. Med. Imaging Sys., Inc., 124 Wn.2d 389, 398, 879 P.2d 276 (1994) (quoting Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 261 n.4, 616 P.2d 644 (1980) (citations omitted)).

The Washington Supreme Court also held that promissory estoppel

is similar to estoppel by silence in that "in either case the party who is estopped has in effect stood by and, in violation of his duty in equity and good conscience to warn another of the real facts, permitted the latter to take some action detrimental to his own interest." In such an instance, it is "not necessary that the one estopped receive some benefit or consideration from the particular transaction," nor is it necessary that he be "guilty of some actual overt act of fraud." Central Heat, Inc. v. Daily Olympian, Inc., 74 Wn.2d 126, 133, 443 P.2d 544 (1968).

There can be no promissory estoppel in the absence of a promise. Corbit, 70 Wn.2d at 538. See WPI 301.02 (Promise Defined). There is also no promissory estoppel without evidence of reliance. Shaw, 75 Wn.App. 755. On the other hand, neither consideration for the promise, nor mutual assent, is required. Havens, 124 Wn.2d at 173.

Damages. A number of courts have limited juries to an award of reliance damages upon a finding of promissory estoppel. E.g., Green v. Interstate United Mgmt. Servs. Corp., 748 F.2d 827 (3d Cir. 1984); RCM Supply Co. Inc. v. Hunter Douglas, Inc., 686 F.2d 1074 (4th Cir. 1982). The Washington Supreme Court considered the issue without resolving it in Farm Crop Energy, Inc. v. Old National Bank of Washington, 109 Wn.2d 923, 750 P.2d 231 (1988) (plaintiff limited to reliance damages on basis of "new business rule").

Additional or alternative claims. A promisee may bring a claim for breach of contract and, in addition or in the alternative, for promissory estoppel. Farm Crop Energy, 109 Wn.2d 923; see also Flower v. T.R.A. Industries, Inc., 127 Wn.App. 13, 30–32, 111 P.3d 1192 (2005) (reversing the trial court's award of summary judgment for an employer and remanding for trial, holding that the plaintiff employee had successfully raised issues of fact about whether a contract for good cause discharge had been formed and that in the alternative plaintiff employee was entitled to pursue a claim for damages based on promissory estoppel if the contract could not be proved). To recover based on promissory estoppel in the context of what would otherwise be an employment at will, the employee must show that a promise of discharge only upon just cause was "clear and definite," as well as one that the employer promisor would reasonably expect to cause the employee promisee to change position in reliance upon the promise. Havens, 124 Wn.2d at 173–74.

Employee handbook cases. In the context of claims based upon breach of promises contained in employee handbook cases, a claim for breach of a promise of specific treatment was recognized in Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 230, 685 P.2d 1081 (1984):

Therefore, we hold that if an employer, for whatever reason, creates

> an atmosphere of job security and fair treatment with promises of *specific treatment in specific situations* and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship.

(Emphasis in original.) But see Bulman v. Safeway, Inc., 144 Wn.2d 335, 27 P.3d 1172 (2001) (holding that an employee must prove reliance on a particular promise of specific treatment and not on a general atmosphere of job security).

The *Thompson* specific treatment claim "is not an implied or express contract claim, but is independent of a contractual analysis and instead rests on a justifiable reliance theory." Korslund v. Dyncorp Tri-Cities Servs., Inc., 156 Wn.2d 168, 185, 125 P.3d 119 (2005) (citations omitted); see also Worley v. Providence Physician Servs. Co., 175 Wn.App. 566, 307 P.3d 759 (2013) (trial court properly dismissed wrongful discharge claim brought by nurse practitioner who failed to establish either a promise of specific treatment or a violation of public policy).

While this type of claim is often based upon a written promise, there is no requirement of a writing; *Thompson* specifically incorporates the Restatement definition of a "promise," which includes both written and oral promises. Thompson, 102 Wn.2d at 230 (citing Restatement (Second) of Contracts § 2 (1981)). "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." Restatement (Second) of Contracts § 2(1) (1981). "The word 'promise' is commonly and quite properly also used to refer to the complex of human relations which results from the promisor's words or acts of assurance." Restatement (Second) of Contracts § 2 cmt. a (1981). Furthermore, the doctrine of justifiable reliance extends to oral promises, and the relevant Restatement provision provides several examples of enforceable oral promises. See Restatement (Second) of Contracts § 90 illus. 7, 16, 17 (1981).

Third party. Regarding a potential claim by a third party, as opposed to a promisee, see Restatement (Second) of Contracts § 90 cmt. c (1981), which explains: "If a promise is made to one party for the benefit of another, it is often foreseeable that the beneficiary will rely on the promise."

Statute of frauds. The Washington Supreme Court has declined to adopt the Restatement (Second) of Contracts section 139, which applies the doctrine of promissory estoppel generally to enforce an oral promise not in compliance with the statute of frauds or RCW 19.36.010

(setting forth categories of contracts that are void if not written). Greaves v. Medical Imaging Systems, Inc., 124 Wn.2d 389, 879 P.2d 276 (1994). On the other hand, the court has held that when there is detrimental reliance, promissory estoppel may be used to enforce a contract in spite of the statute of frauds against a "party who promises, implicitly or explicitly, to make a memorandum of a contract in order to satisfy the statute of frauds, and then breaks that promise." Klinke, 94 Wn.2d at 259 (quoting In re Estate of Nelson, 85 Wn.2d 602, 537 P.2d 765 (1975) (citing Restatement (Second) of Contracts § 178 cmt. f (1981))).

For a detailed discussion of promissory estoppel issues, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice ch. 6 (3d ed.).

[Current as of September 2021.]

WPI 301A.02

QUASI CONTRACT

[If you find that there is no enforceable contract between the parties,] you shall award (name of plaintiff) the reasonable value of the other benefit conferred if (name of plaintiff) has proved by a preponderance of the evidence that

(1) (name of plaintiff) conferred a benefit upon the defendant;

(2) (name of defendant) had an appreciation or knowledge of the benefit; and

(3) the defendant's acceptance or retention of the benefit without payment of its value is [inequitable] [unjust] under the circumstances.

NOTE ON USE

If plaintiff has combined a quasi contract claim with a contract claim, include the first bracketed phrase. Combine this instruction with WPI 303.08 (Contract—Damages), as appropriate.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

COMMENT

This instruction has been modified for this edition. The elements have been changed to conform more closely to the Washington Supreme Court's decision in Young v. Young, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008):

> "Three elements must be established in order to sustain a claim based on unjust enrichment: a benefit conferred upon the defendant by the plaintiff; an appreciation or knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value."

Young, 164 Wn.2d at 484 (quoting Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc., 61 Wn.App. 151, 159–60, 810 P.2d 12 (1991) (equating unjust enrichment with quasi contract)).

Nature of quasi contract claim. A quasi contract is also called a contract implied in law. It is not, however, based on contract at all. Instead it "arises from an implied duty of the parties," not based on consent or agreement but on equitable principles calling for the prevention of unjust enrichment. Heaton v. Imus, 93 Wn.2d 249, 252, 608 P.2d 631 (1980); Granville Condo. Homeowners Ass'n v. Kuehner, 177 Wn.App. 543, 312 P.3d 702 (2013) (court held against condominium association finding tenant-at-will could not be held liable for owner's delinquent assessments). A quasi contract has also been described as a common law action for "restitution" which employs unjust enrichment as an independent basis of substantive liability. Davenport v. Wash. Educ. Ass'n, 147 Wn.App. 704, 725, 197 P.3d 686, 697 (2008). "Restitution" has been described as both a cause of action and a remedy." Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. a (2011).

A contract implied in law, i.e., quasi contract, should not be confused with a contract implied in fact, which is a contract with a different remedy, i.e., quantum meruit. Young, 164 Wn.2d, at 483–86.

A party to a valid express contract may not bring an action on a quasi (implied in law) contract related to the same subject matter. Chandler v. Wash. Toll Bridge Auth., 17 Wn.2d 591, 604, 137 P.2d 97 (1943); Pierce Cnty. v. State, 144 Wn.App. 783, 185 P.3d 594 (2008) (trial court properly found implied contract in addition to express contract because express contract did not address responsibility to provide long-term care). Recovery in quasi contract is appropriate when money, property, or some other form of benefit is placed in one person's possession under such circumstances that "in equity and good conscience that person ought not to retain it." Fam. Med. Bldg., Inc. v. Dep't of Social & Health Servs., 37 Wn.App. 662, 669–70, 684 P.2d 77 (1984), affirmed in part and reversed in part, 104 Wn.2d 105, 702 P.2d 459 (1985).

Right to a jury. The state constitution protects the right to a jury trial in purely legal actions but not in purely equitable actions. Const. art. I, § 21; Auburn Mech., Inc., v. Lydig Constr., Inc., 89 Wn.App. 893, 897, 951 P.2d 311 (1998). Many quasi contract claims have both equitable and legal aspects; these claims are based on equitable principles, but they usually seek the legal remedy of monetary damages (as opposed to the more traditional equitable remedies of injunction, specific performance, or constructive trust). Auburn Mech., 89 Wn.App. at 901–02.

The Court of Appeals has held that whether a quasi contract action is a legal action depends on the nature of the requested relief. A quasi contract claim that seeks only monetary damages is a legal claim triggering the right to a jury trial. See Auburn Mech., 89 Wn.App. at 905.

When a plaintiff seeks both damages and a more traditional equitable remedy, the court will need to balance several factors in determining whether the action is primarily legal or equitable. See Auburn Mech., 89 Wn.App. at 898, 905. Doubts about the legal vs. equitable nature of the action should be resolved in favor of a jury trial. Shepler Constr., Inc. v. Leonard, 175 Wn.App. 239, 306 P.3d 988 (2013); Auburn Mech., 89 Wn.App. 893.

Elements. The doctrine requires a showing "that not only was the party sought to be held enriched, but the enrichment must be unjust." Chandler, 17 Wn.2d at 603. As to the first point, the plaintiff must establish that the defendant received a "benefit," broadly defined.

> A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but where he saves the other from expense or loss. The word "benefit," therefore, denotes any form of advantage.

Chandler, 17 Wn.2d at 602 (quoting Restatement (First) of Restitution § 1(b) (1937)).

The "mere fact that a person benefits another is not of itself sufficient" to require the other to make restitution, however. Chandler, 17 Wn.2d at 601. It must also be demonstrated that the enrichment, or retention of the benefit, is "unjust." See also Puget Sound Sec. Patrol, Inc. v. Bates, 197 Wn.App. 461, 389 P.3d 709 (2017).

When a person performs services or confers a benefit "unconditionally," that person will not be entitled to restitution except "where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of third persons." Even if an "emergency" exception applies, however, it must appear that the service was performed with the intent to ask for remuneration. Chandler, 17 Wn.2d at 603.

In addition, the benefits must have been purposely rendered to the defendant. A plaintiff cannot recover in quasi contract when he performed services under a contract with a third party, and the benefits to the defendant were "purely incidental." Chandler, 17 Wn.2d at 604.

Remedy. The basic remedy for a successful claim in quasi contract (i.e., a contract implied in law) is unjust enrichment. Young, 164 Wn.2d

at 483–86 (distinguishing the remedy of unjust enrichment from that of quantum meruit, with the former applying to contracts implied in law and the latter to contracts implied in fact). The *Young* court rejected previous opinions that had imprecisely indicated that the remedy for contracts implied in law is quantum meruit, see, e.g., Heaton, 93 Wn.2d at 252; Auburn Mech., 89 Wn.App. at 904; see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice § 1:9 (3d ed.); Comment to WPI 303.08 (Contract—Damages—Restitution).

[Current as of November 2021.]

CHAPTER 302

CONTRACTS—PERFORMANCE AND BREACH

WPI 302.01 Breach of Contract—Non-Performance of Duty
WPI 302.02 Conditions Precedent or Conditions Concurrent
WPI 302.03 Material Breach—Definition
WPI 302.04 Excuse of Performance—Anticipatory Breach
WPI 302.05 Elements of Equitable Estoppel
WPI 302.06 Excuse of Performance—Estoppel
WPI 302.07 Excuse of Performance—Waiver
WPI 302.08 Excuse of Performance—Interference With Contractual Performance
WPI 302.09 Excuse of Performance—Impossibility or Impracticability
WPI 302.10 Excuse of Performance—Frustration of Purpose
WPI 302.11 Implied Duty of Good Faith and Fair Dealing

WPI 302.01

BREACH OF CONTRACT—NON-PERFORMANCE OF DUTY

The failure to perform fully a contractual duty when it is due is a breach of contract.

NOTE ON USE

Use this instruction along with an explanation of the particular contractual duty at issue and the factors affecting when the performance is due, according to the facts of the case. See the Comment below.

If the remedy sought or the defense being raised requires that the breach be material, use WPI 302.03 (Material Breach) with this instruction.

COMMENT

This instruction is based on Restatement (Second) of Contracts section 235(2): "When performance of a duty under a contract is due

any non-performance is a breach." Restatement (Second) of Contracts § 235(2) (1981). Comment b explains that when performance is due:

> [a]nything short of full performance is a breach, even if the party who does not fully perform was not at fault and even if the defect in his performance was not substantial . . . Non-performance includes defective performance as well as an absence of performance.

Restatement (Second) of Contracts § 235 cmt. b (1981); see also TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc., 140 Wn.App. 191, 165 P.3d 1271 (2007) (citing Restatement (Second) of Contracts (1981)).

A great many factors may affect whether performance is "due," including the passage of a period of time, the occurrence of a condition precedent, or the discharge of a duty by performance or a change of circumstances. Restatement (Second) of Contracts § 235(2) (1981). See, e.g., WPI 302.04 (Excuse of Performance—Anticipatory Breach), WPI 302.06 (Excuse of Performance—Estoppel), WPI 302.07 (Excuse of Performance—Waiver), WPI 302.08 (Excuse of Performance—Interference With Contractual Performance), WPI 302.09 (Excuse of Performance—Impossibility or Impracticability), and WPI 302.10 (Excuse of Performance—Frustration of Purpose).

When the contract does not specify to the contrary, performances that can be rendered simultaneously are due simultaneously. Restatement (Second) of Contracts § 234 (1981).

For further discussion of material breaches of contract, see the Comments to WPI 302.03 (Material Breach—Definition) and WPI 300.02 (Burden of Proof on the Issues—Breach of Contract—No Affirmative Defense).

[Current as of April 2021.]

WPI 302.02

CONDITIONS PRECEDENT OR CONDITIONS CONCURRENT

A party seeking to enforce the terms of a contract, or to recover damages for the breach of a contract, has the burden of proving that all conditions precedent or conditions concurrent to the other party's duty to perform under the contract have been fulfilled or that such fulfillment was excused.

(Name of party) **claims that the following condition[s] [precedent] [and] [concurrent] were not timely fulfilled:**

(State here the alleged condition precedent or concurrent to the party's obligation to perform that the party claims was not fulfilled.)

In order to recover, (name of party) **has the burden of proving, by a preponderance of the evidence, that all conditions [precedent] [and] [concurrent] were fulfilled or that fulfillment of such conditions was excused. [A condition is considered fulfilled if there is substantial performance. Substantial performance means performance in good faith and in compliance with the contract, except for minor and relatively unimportant deviations.]**

NOTE ON USE

Use this instruction when the court has determined that the enforcing party's performance is a condition precedent or concurrent to the other party's obligations under the contract, or when there is any other condition precedent or concurrent to the non-enforcing party's obligation to perform.

If the non-enforcing party asserts that the enforcing party failed to fulfill a condition concurrent by being in material breach of the contract, combine this instruction with WPI 302.03 (Material Breach—Definition).

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

If the party seeking enforcement of the contract alleges that its duty of performance was excused by the anticipatory breach of the other party, combine this instruction with WPI 302.04 (Excuse of Performance—Anticipatory Breach). If the party seeking enforcement alleges that its duty of performance was otherwise excused, see WPI 302.06 (Excuse of Performance—Estoppel) and instructions following.

Use the bracketed sentences if the condition is claimed to have been satisfied by substantial performance.

COMMENT

Introduction. Conditions precedent may be express, implied in fact, or constructive. Colorado Structures, Inc. v. Ins. Co. of the W., 161 Wn.2d 577, 167 P.3d 1125 (2007) (general contractor brought action against surety to recover on subcontractor's performance bond); Ross v. Harding, 64 Wn.2d 231, 236, 391 P.2d 526 (1964) (citing 5 Williston, Contracts § 668, at 152 (3d ed.); 3A Corbin, Contracts §§ 631, 632, at 21–22).

> "Conditions precedent" are those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available. 3A Corbin, Contracts § 628, p. 16, Partlow v. Mathews, 43 Wn.2d 398, 261 P.2d 394 [1953]. A breach of a "promise" subjects the promisor to liability in damages, but does not necessarily excuse performance on the other side. Nonperformance or nonoccurrence of a "condition" prevents the promisee from acquiring a right, or deprives him of one, but subjects him to no liability. 5 Williston, Contracts (3d ed.) § 665, p. 132.

Ross, 64 Wn.2d at 236.

With regard to an express condition precedent set forth in the contract, "[a]ny words which express, when properly interpreted, the idea that the performance of a promise is dependent on some other event will create a condition. Phrases and words such as 'on condition,' 'provided that,' 'so that,' 'when,' 'while,' 'after,' or 'as soon as' are often used." Ross, 64 Wn.2d at 237; see also Lokan & Assocs., Inc. v. Am. Beef Processing, LLC, 177 Wn.App. 490, 311 P.3d 1285 (2013); Walter Implement, Inc. v. Focht, 107 Wn.2d 553, 730 P.2d 1340 (1987).

Burden of proof. "The party seeking enforcement of the contract has the burden of proving performance of an express condition precedent." Focht, 107 Wn.2d at 557; see also Wlasiuk v. Whirlpool

Corp., 81 Wn.App. 163, 914 P.2d 102 (1996), opinion modified, 932 P.2d 1266. As the Supreme Court has stated:

> Proof of performance of an express condition precedent is a burden which must be met by the party who seeks enforcement of the contract. . . . "A plaintiff, in order to maintain an action on the contract, must have complied with the conditions precedent contained therein. That is to say, a breach by a plaintiff of a material condition precedent relieves a defendant of liability under a contract."

Ross, 64 Wn.2d at 240–41 (quoting Atkinson v. Thrift Super Markets, Inc., 56 Wn.2d 593, 594, 354 P.2d 709 (1960)); see also State v. Trask, 91 Wn.App. 253, 273–74, 957 P.2d 781 (1998) (a breach by one party does not necessarily excuse the other party from performing under the contract; the issue depends on whether the parties intended the first party's performance to be a condition precedent).

When a party wrongfully repudiates or rescinds a contract, the other party's performance of a condition precedent is excused unless it is proved that the condition precedent would not have been satisfied. The burden of proving this proposition is on the repudiating party. Puget Sound Serv. Corp. v. Bush, 45 Wn.App. 312, 319, 724 P.2d 1127 (1986).

Discharge of duties. When the contract specifies a condition precedent to the obligation to perform, and the nonoccurrence of the condition precedent is not the fault of either party, both parties' contractual duties are discharged. CHG Intern., Inc. v. Robin Lee, Inc., 35 Wn.App. 512, 515, 667 P.2d 1127 (1983).

> Since an express condition is a contract term and part of the bargain, literal operation of the condition is normally to be anticipated. The promisee bought a qualified right. He can expect excuse of the condition and relief from his bargain only if the promisor wrongfully interferes with satisfaction of the condition, or waives it, or if the condition is not of importance to the promisor and denial of relief for the promisee would occasion him a serious forfeiture.

Shattuck, *Contracts in Washington: 1937–1957: Part III*, 34 Wash. L. Rev. 467, 469 (1959). Similarly, if one party's performance is subject to a condition precedent, the nonoccurrence of that condition excuses the promisee's performance. Hadaller v. Port of Chehalis, 97 Wn.App. 750, 757, 986 P.2d 836 (1999).

Substantial performance. "The doctrine of substantial perfor-

mance is applied in rare instances where only 'minor and relatively unimportant deviations' remain to accomplish full contractual performance." Taylor v. Shigaki, 84 Wn.App. 723, 729, 930 P.2d 340 (1997) (quoting 17A Am.Jur.2d Contracts § 634 (1991)); see also DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice § 10:6 (3d ed.).

The substantial performance doctrine applies to all bilateral contracts for an agreed exchange of performances except for contracts for the sale of goods. The UCC's "perfect tender rule" applies to the latter. See Kunsch, 1A Washington Practice, Methods of Practice ch. 36 (4th ed.). Moreover, while substantial performance triggers the duty of the other party to perform its part of the contract, it does not deprive that party of the right to recover damages for the discrepancy between substantial performance and what was promised in the contract. Fuller v. Rosinski, 79 Wn.2d 719, 723, 488 P.2d 1061 (1971); see also Eastlake Constr. Co., Inc. v. Hess, 102 Wn.2d 30, 686 P.2d 465 (1984) (discussing "substantial performance").

Conditions concurrent. When the duties of two parties are to be performed simultaneously, as with the exchange of money for property, "[t]he promise of each is conditional upon a tender of performance by the other." DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice § 8:4 (3d ed.). "If a contract requires performance by both parties, the party claiming nonperformance of the other must first establish as a matter of fact the party's own performance." Willener v. Sweeting, 107 Wn.2d 388, 392, 730 P.2d 45 (1986).

In a contract for the sale of land, for example, the payment of the purchase price and the delivery of the deed are typically concurrent conditions, and the vendor "may not put the buyer in default until the vendor has offered to perform." Wallace Real Est. Inv., Inc. v. Groves, 124 Wn.2d 881, 887, 881 P.2d 1010 (1994). In such cases, "[a]n actual tender of performance may be excused when there is a willingness and an ability to perform, and actual performance has been prevented or expressly waived by the party to whom performance is due." Kane v. Borthwick, 50 Wash. 8, 12, 96 P. 516, 518 (1908), quoted in Carlson v. Leonardo Truck Lines, Inc., 13 Wn.App. 795, 538 P.2d 130 (1975) (holding plaintiff not entitled to sue repudiating seller for breach of contract when plaintiff failed to meet burden of proving it could have obtained the amount required for payment on the date fixed for performance).

Concurrent conditions may be implied. For example, when no time is set in the contract for payment and delivery, and concurrent conditions are presumed to have been intended. See Meeker v. Johnson, 3 Wash. 247, 259, 28 P. 542 (1891); see generally Restatement (Second) of

Contracts § 234(1) (1981) (performances that can be performed simultaneously are due simultaneously unless the contract or circumstances indicate to the contrary).

Instruction format. The format of the instruction, calling for a specific condition alleged not to have been fulfilled, is suggested by the rules of pleading: "In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity." CR 9(c).

For further discussion of the issues underlying this instruction, see the Comment to WPI 300.02 (Burden of Proof on the Issues—Breach of Contract—No Affirmative Defense) and DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice §§ 8:3, :4, :7 (3d ed.).

[Current as of April 2021.]

WPI 302.03

MATERIAL BREACH—DEFINITION

A "material breach" is a breach that is serious enough to justify the other party in abandoning the contract. A "material breach" is one that substantially defeats the purpose of the contract, or relates to an essential element of the contract, and deprives the injured party of a benefit that he or she reasonably expected.

NOTE ON USE

Use this instruction when one party seeks to avoid enforcement of a contract on the basis of a material breach by the other party and it is appropriate for the jury to determine whether a breach is material. Depending upon the circumstances of the case, it may be appropriate to add language from the provisions of the Restatement (Second) of Contracts section 241, set forth in the Comment below.

COMMENT

The instruction is cited as authoritative in Park Avenue Condominium Owners Association v. Buchan Developments, L.L.C., 117 Wn.App. 369, 71 P.3d 692 (2003).

"A breach or non-performance of a promise by one party to a bilateral contract, so material as to justify a refusal of the other party to perform a contractual duty, discharges that duty." Jacks v. Blazer, 39 Wn.2d 277, 285, 235 P.2d 187 (1951); see also 224 Westlake, LLC v. Engstrom Props., LLC, 169 Wn.App. 700, 281 P.3d 693 (2012).

A material breach sufficient to allow rescission of a contract is one that "substantially defeats the purpose of the contract." Mitchell v. Straith, 40 Wn.App. 405, 410, 698 P.2d 609 (1985); see also Top Line Builders, Inc. v. Bovenkamp, 179 Wn.App. 794, 808, 320 P.3d 130 (2014).

The materiality of a breach is a question of fact. Bailie Commc'ns, Ltd. v. Trend Bus. Sys., 53 Wn.App. 77, 82, 765 P.2d 339 (1988). The question of materiality depends on the circumstances of each particular case. Vacova Co. v. Farrell, 62 Wn.App. 386, 403, 814 P.2d 255 (1991).

Breach of a substantial part of an entire contract gives the injured party an election to abandon the contract, or to perform and recover damages. Colorado Structures, Inc. v. Ins. Co. of the W., 161 Wn.2d 577,

167 P.3d 1125 (2007) (general contractor brought action against surety to recover on subcontractor's performance bond); Campbell v. Hauser Lumber Co., 147 Wash. 140, 145, 265 P. 468 (1928). In determining whether a breach of some, but not all, of the contract terms is substantial, rather than trivial or inconsequential, the jury may properly consider whether the injured party would have been less willing to enter the contract without those terms. Campbell, 147 Wash. at 148.

According to the Restatement (Second) of Contracts § 241 (1981):

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
>
> (a) the extent to which the injured party will be deprived of a benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeitures;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failures, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

See Bailie Commc'ns, 53 Wn.App. 77 (citing and applying the Restatement (Second) of Contracts (1981) criteria); see also DC Farms, LLC v. Conagra Foods Lamb Weston, Inc., 179 Wn.App, 205, 221, 317 P.3d 543 (2014); DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice § 10:1 (3d ed.).

[Current as of April 2021.]

WPI 302.04

EXCUSE OF PERFORMANCE—ANTICIPATORY BREACH

A party who is ready, willing, and able to perform is excused from the duty to perform when the other party repudiates the contract by word or act that definitely indicates [he] [she] [it] cannot or will not perform [his] [her] [its] obligations under the contract.

In this case, if (name of party) **proves by a preponderance of evidence that** (name of other party) **repudiated the contract, then** (name of party) **was excused from the duty to** (set forth in simple terms the duty claimed to be excused).

NOTE ON USE

Use this instruction when it is claimed that a party's duty of performance was discharged or excused by the anticipatory breach or repudiation of the contract by the other party. Since either plaintiff or defendant may claim repudiation by the other, insert names of parties in blanks as appropriate.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

COMMENT

This instruction is based on various formulations in Washington case law. "One who is ready, willing and able to tender performance is relieved of that duty when the other party by word or act indicates that he will not perform." Sherman v. Lunsford, 44 Wn.App. 858, 863, 723, P.2d 1176 (1986) (citing Kreger v. Hall, 70 Wn.2d 1002, 425 P.2d 638 (1967)). An "anticipatory breach occurs when one of the parties to a bilateral contract either expressly or impliedly repudiates the contract prior to the time of performance. A party's intent not to perform may not be implied from doubtful and indefinite statements that performance may or may not take place." Wallace Real Est. Inv., Inc. v. Groves, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994); see also State v. Brown, 92 Wn.App. 586, 602, 965 P.2d 1102 (1998).

Anticipatory breach or repudiation requires a "positive statement or action by the promisor indicating distinctly and unequivocally that

he either will not or cannot substantially perform any of his contractual obligations." Groves, 124 Wn.2d at 898 (quoting Olsen Media v. Energy Scis., Inc., 32 Wn.App. 579, 585, 648 P.2d 493 (1982)); see also Wallace v. Kuehner, 111 Wn.App. at 817.

Anticipatory breach or repudiation may be asserted by a plaintiff to excuse or discharge the plaintiff's duty to perform a condition precedent. See, e.g., Artz v. O'Bannon, 17 Wn.App. 421, 562 P.2d 674 (1977). The applicable principles and burdens are well illustrated in Puget Sound Service Corp. v. Bush, 45 Wn.App. 312, 316, 724 P.2d 1127 (1986) ("Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused.").

Withdrawal of repudiation. A party may withdraw a previously expressed repudiation of a contract, so long as the other party has not acted in reliance on it. Versuslaw, Inc. v. Stoel Rives, LLP, 127 Wn.App. 309, 111 P.3d 866 (2005) (trial court should have treated issue of repudiation as factual question for jury to decide).

Issue for jury. "Whether there is a repudiation of contract is a question for the fact finder." Brothers v. Pub. Sch. Emp. of Wash., 88 Wn.App. 398, 408, 945 P.2d 208 (1997); see also Groves, 124 Wn.2d at 897 (question of fact).

For further discussion of the issues underlying this instruction, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice § 10:23 (3d ed.).

[Current as of April 2021.]

WPI 302.05

ELEMENTS OF EQUITABLE ESTOPPEL

A party is not allowed to make a claim that contradicts or repudiates [his] [her] [its] earlier statement, admission, or conduct on which another has reasonably relied, if the relying party would be injured by such contradiction or repudiation. This is known as "estoppel."

In order to prove estoppel, (insert party claiming estoppel) has the burden of proving, by clear, cogent, and convincing evidence:

(1) That (insert other party) said or did something on which (insert claiming party) relied;

(2) That (insert claiming party) reasonably relied on (insert other party)'s statement or conduct; and

(3) That (insert claiming party) would be injured if (insert other party) were allowed to contradict that statement or conduct now.

NOTE ON USE

Use this instruction when the jury needs a broad definition of the principle of equitable estoppel. For cases involving equitable estoppel in the specific context of performance issues, use WPI 302.06 (Excuse of Performance—Estoppel) instead of this instruction.

The parties are left undesignated, because the estoppel may be raised by a party seeking enforcement of a contract, i.e., as a defense to a defense, or by a party seeking to avoid enforcement of a contract. When equitable estoppel is asserted as an affirmative defense by a party seeking to avoid enforcement of a contract, combine this instruction with WPI 302.06 (Excuse of Performance—Estoppel).

Use this instruction when the court has determined that the evidence would warrant the application of the principle of equitable estoppel, including a determination that the non-moving party's conduct was sufficiently inconsistent with the claim that the moving party is attempting to defend.

Use this instruction with WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence) to explain the meaning of proof by clear, cogent, and convincing evidence.

Regarding the separate issue of promissory estoppel, which may be asserted in response to a claim of lack of consideration, see the Comment to WPI 301A.01 (Promissory Estoppel).

COMMENT

This instruction is based on the elements of equitable estoppel as set forth in Berschauer/Phillips Construction Co. v. Seattle School District No. 1, 124 Wn.2d 816, 831, 881 P.2d 986 (1994):

> (1) an admission, statement or act inconsistent with a claim afterward asserted; (2) action by another in reasonable reliance on that act, statement, or admission; and (3) injury to the party who relied if the court allows the first party to contradict or repudiate such admission, statement or act.

See also Ellerbroek v. CHS Inc., 13 Wn.App.2d 278, 463 P.3d 750 (2020); Comment, WPI 302.06 (Excuse of Performance—Estoppel). Equitable estoppel is not favored by the courts. Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc., 168 Wn.App. 56, 277 P.3d 18 (2012).

Each of the elements of equitable estoppel must be proved by clear, cogent, and convincing evidence. Lybbert v. Grant Cnty., 141 Wn.2d 29, 35, 1 P.3d 1124 (2000); Berschauer/Phillips, 124 Wn.2d at 831. When equitable estoppel is asserted against the government, two additional elements (avoidance of "manifest injustice" and preservation of governmental functions) must be established. Wilson v. Wash. State Dep't of Ret. Sys., 15 Wn.App.2d 111, 475 P.3d 193 (2020).

In a number of cases the courts have described the second element as action "on the faith of" the other party's statement or act. See, e.g., Pub. Util. Dist. No. 1 v. Wash. Pub. Power Supply Sys., 104 Wn.2d 353, 365, 705 P.2d 1195 (1985). In Leonard v. Washington Employers, Inc., 77 Wn.2d 271, 461 P.2d 538 (1969), the court explained that these elements are not necessarily sufficient: "Not all those who rely upon another's conduct or statement may raise an estoppel. Rather it is only those who have a right to rely upon such acts or representations." For example, the party claiming to have been induced to act must either have been ignorant of the true facts or without the means of acquiring such facts. Pub. Util. Dist. No. 1, 104 Wn.2d at 365. According to the court in *Leonard*, "absent fraud or misrepresentation, estoppel runs in

favor only of those who have reasonably relied on another's conduct or declarations." Leonard, 77 Wn.2d at 280.

Generally, a party asserting estoppel must have "clean hands," or be free from fault, see, e.g., Kirk v. Moe, 114 Wn.2d 550, 557, 789 P.2d 84 (1990), and Rhoades v. City of Battle Ground, 115 Wn.App. 752, 769–70, 63 P.3d 142 (2003), unless allowing the estoppel would protect the public interest and the non-moving party is more culpable. See Ellis v. William Penn Life Assur. Co. of Am., 124 Wn.2d 1, 873 P.2d 1185 (1994).

[Current as of April 2021.]

WPI 302.06

EXCUSE OF PERFORMANCE—ESTOPPEL

(Name of party) claims that (name of party)'s [admission,] [statement,] [or] [act] (describe) caused (name of party) to fail to perform according to the terms of the contract, and that (name of party) should not now be allowed to repudiate or contradict that [admission,] [statement,] [or] [act] by claiming (describe inconsistent claim).

If you find that (name of party) has proved, by clear, cogent, and convincing evidence that:

(1) (name of party) failed to perform according to the terms of the contract in reliance on (name of party)'s [admission,] [statement,] [or] [act];

(2) (name of party) reasonably relied on (name of party)'s [admission,] [statement,] [or] [act]; and

(3) (name of party) would be injured if (name of party) were allowed to contradict that [admission,] [statement,] [or] [act];

Then (name of party)'s performance according to the contract terms will be excused.

NOTE ON USE

Use this instruction, instead of WPI 302.05 (Elements of Equitable Estoppel), when a party has asserted the affirmative defense of equitable estoppel in the context of a performance issue. Use this instruction when the court has determined that the evidence would warrant the application of the principle of equitable estoppel, including a determination that the non-moving party's conduct was sufficiently inconsistent with the claim that the moving party is attempting to defend.

Include all bracketed terms supported by the evidence. In the blank line marked "(describe)," describe the previous statements or conduct of the non-moving party that are alleged to have caused the moving party to change position. In the blank line marked "(describe inconsistent claim),"

describe the non-moving party's trial claim (e.g., breach of contract on the basis of defendant's failure to _____).

Insert an appropriate provision in WPI 300.03 (Burden of Proof on the Issues—Breach of Contract—With Affirmative Defenses).

Use this instruction with WPI 160.03 (Fraud—Burden of Proof—Combined with Preponderance of Evidence) to explain the meaning of proof by clear, cogent, and convincing evidence.

COMMENT

See the Comment to WPI 302.05 (Elements of Equitable Estoppel).

Estoppel may be asserted as an affirmative defense; the party asserting the defense has the burden of proof. See Comment, WPI 300.03 (Burden of Proof on the Issues—Breach of Contract—With Affirmative Defenses); CR 8(c). Equitable estoppel may be used only as a defense, acting as a shield against the enforcement of a contract, even though promissory estoppel may be used offensively to support a cause of action for damages. Chem. Bank v. Wash. Pub. Power Supply Sys., 102 Wn.2d 874, 901, 691 P.2d 524 (1984).

Each of the elements of equitable estoppel must be proved by clear, cogent, and convincing evidence. Shelcon Constr. Grp., LLC v. Haymond, 187 Wn.App. 878, 351 P.3d 895 (2015) (bank was not entitled to claim equitable estoppel where its reliance was not reasonable); Lybbert v. Grant Cnty., 141 Wn.2d 29, 35, 1 P.3d 1124 (2000); Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 881 P.2d 986 (1994); Robinson v. City of Seattle, 119 Wn.2d 34, 82, 830 P.2d 318 (1992).

For further discussion of the issues underlying this instruction, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice § 10:12 (3d ed.).

[Current as of April 2021.]

WPI 302.07

EXCUSE OF PERFORMANCE—WAIVER

Either party to a contract may waive the right to require performance of the other. A waiver is the intentional giving up of a known right.

A party asserting that its performance is excused on the ground of waiver has the burden of proving that the other party intended to give up its contractual right to that performance after knowing all of the relevant facts.

[A right may be waived in either of two ways. A party may directly state an intent to waive a contractual right, or a party may imply such an intent through his or her statements or conduct. An implied waiver, however, may be based only on unequivocal, rather than doubtful or ambiguous, statements or conduct.]

In this case, (name of party)**'s duty to** (set forth performance claimed to be excused) **was excused if** (name of same party) **has proved, by a preponderance of the evidence, that** (name of other party) **waived [his] [her] [its] right to that performance under the contract.**

NOTE ON USE

Use this instruction when a party has asserted waiver in excuse of performance and there is a sufficient evidentiary basis for taking the issue to the jury. Insert an appropriate provision in WPI 300.03 (Burden of Proof on the Issues—Breach of Contract—With Affirmative Defenses) when waiver is asserted as an affirmative defense. Modify the instruction if the condition allegedly waived is an event or occurrence rather than a performance by the party asserting waiver.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

If the circumstances warrant, use the bracketed paragraph to explain the requirements for implied waivers. See the Comment below.

It may also be appropriate to add language regarding the effect of a

contractual limit on the terms of a waiver or a contractual non-waiver clause. See the Comment below.

COMMENT

Waiver agreements. A decision to relinquish a known right under the terms of a contract constitutes a waiver, excusing the other party's obligation to perform according to the relevant contract terms. Sherman v. Lunsford, 44 Wn.App. 858, 862–63, 723 P.2d 1176 (1986). A party against whom waiver is claimed must have intended to relinquish the right, advantage, or benefit and the party's action must have been inconsistent with any intent other than to waive it. City of Puyallup v. Hogan, 168 Wn.App. 406, 277 P.3d 49 (2012) (lease did not manifest unequivocal intent to waive right to share in condemnation award); Wagner v. Wagner, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980).

Waiver and estoppel distinguished. Waiver and estoppel are frequently asserted together, and the facts may give rise to both. Schuster v. Prestige Senior Mgmt., L.L.C., 193 Wn.App. 616, 376 P.3d 412 (2016) (trial court properly denied motion to compel arbitration where defendant waived procedural right). However, the distinction between them should be made clear. Waiver does not require reliance or consideration, and may arise unilaterally. Cornerstone Equip. Leasing, Inc. v. MacLeod, 159 Wn.App. 899, 247 P.3d 790 (2011). The proof required is only a preponderance of the evidence. Estoppel, on the other hand, requires reasonable reliance on a statement or conduct inconsistent with a claim later asserted. Tupper v. Tupper, 15 Wn.App.2d 796, 812, 478 P.3d 1132 (2020). It requires proof by clear, cogent and convincing evidence. Tupper, 15 Wn.App.2d at 812 (quoting Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 831, 881 P.2d 986 (1994)).

Unilateral waivers. According to the Washington cases, a waiver may be unilateral and without consideration so long as the right waived was known and existed at the time of the knowing waiver. Sherman, 44 Wn.App. at 862–63 (citing Panorama Residential Protective Ass'n v. Panorama Corp. of Wash., 97 Wn.2d 23, 28–29, 640 P.2d 1057 (1982)); see also Gorge Lumber Co. v. Brazier Lumber Co., 6 Wn.App. 327, 335, 493 P.2d 782 (1972) ("As a waiver in Washington is unilateral . . ., there can be a waiver without consideration as well."). A party to a contract may waive any contract provision that is made for its benefit. Mike M. Johnson, Inc., v. Cnty. of Spokane, 150 Wn.2d 375, 386, 78 P.3d 161 (2003).

Burden of proof. Waiver is an affirmative defense; the party asserting the defense has the burden of proof. See Comment, WPI 300.03

(Burden of Proof on the Issues—Breach of Contract—With Affirmative Defenses); CR 8(c).

Implied waiver. A waiver may be express, or may be inferred from circumstances indicating an intent to waive. In re Estate of Petelle, 195 Wn.2d 661, 462 P.3d 848 (2020) (waiver language in marital dissolution agreement was enforceable); Mike M. Johnson, 150 Wn.2d at 386; Singer Credit Corp. v. Mercer Island Masonry, Inc., 13 Wn.App. 877, 884, 538 P.2d 544 (1975). Nevertheless, "to constitute a waiver, other than by express agreement, there must be unequivocal acts or conduct evincing an intent to waive . . . Intent cannot be inferred from doubtful or ambiguous factors." Wagner, 95 Wn.2d at 102 (citations omitted); see also Mike M. Johnson, 150 Wn.2d at 386. "Mere silence does not constitute a waiver unless there is an obligation to speak." Voelker v. Joseph, 62 Wn.2d 429, 435, 383 P.2d 301 (1963).

Courts disfavor implied waivers of contractual rights to arbitration, so that the party seeking waiver of these rights bears a "heavy" burden of proof. See Brundridge v. Fluor Fed. Servs., Inc., 109 Wn.App. 347, 356, 35 P.3d 389 (2001); Steele v. Lundgren, 85 Wn.App. 845, 852, 935 P.2d 671 (1997) (also citing several federal cases involving contractual rights to arbitration). In one case, the Court of Appeals stated this principle more broadly, holding that the heavy burden of proof applies to the implied waiver of contractual rights generally. Oregon Mut. Ins. Co. v. Barton, 109 Wn.App. 405, 418, 36 P.3d 1065 (2001) (at issue was an implied waiver of the right to enforce a settlement).

Distinctions among waivers. Some commentators have distinguished among three types of waivers:

- waiver at the time of contract formation (agreement, but no separate consideration required), see, e.g., the circumstances of Sherman, 44 Wn.App. 858;
- waiver after contracting but before breach (consideration required unless the conditions waived are "immaterial"); and
- waiver after performance alleged to be in breach (which should be analyzed as an election of remedies, not withdrawable once made), see, e.g., Voelker, 62 Wn.2d 429; Kessinger v. Anderson, 31 Wn.2d 157, 196 P.2d 289 (1948); Gorge Lumber Co., 6 Wn.App. at 335.

Though the cited Washington cases seem to fall within the exceptions to the requirement of consideration for waiver of condition in an executory contract, they do not explicitly distinguish among these applications of the rule.

Nonwaiver clauses. While a nonwaiver clause in the underlying contract may in certain circumstances operate to prevent a waiver, see First Union Management, Inc. v. Slack, 36 Wn.App. 849, 679 P.2d 936 (1984) (clause prevented acceptance of rent from constituting waiver of nonmonetary breaches), courts have strictly construed such clauses in insurance contracts:

> [A] nonwaiver agreement can be waived either expressly or impliedly by the insurer or its authorized representatives. Such agreements are construed strictly against the insurer and liberally in favor of the insured, and will not be extended beyond the exact terms of the agreements. In addition, such an agreement will not operate to prevent a waiver if it is vaguely or ambiguously drafted.

Weber v. Biddle, 4 Wn.App. 519, 524, 483 P.2d 155 (1971).

Treatise. For further discussion of the issues underlying this instruction, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice § 10:11 (3rd ed.).

[Current as of June 2021.]

WPI 302.08

EXCUSE OF PERFORMANCE—INTERFERENCE WITH CONTRACTUAL PERFORMANCE

If one party enters into a contract with another, there is an implied agreement by each to do nothing that will hinder, prevent, or interfere with the performance of the contract terms by the other.

If (name of party) **proves by a preponderance of the evidence that** (name of other party) **interfered with or prevented** (set forth performance or occurrence)**, then** (name of party) **was excused from performing [its] [his] [her] duty of** (set forth performance, or add "showing that" a specified event occurred)**.**

NOTE ON USE

Use this instruction if there is an evidentiary basis for an affirmative defense of interference with contractual performance, or if a party alleges that its duty of performance or the occurrence of a condition precedent was excused by such interference. Use WPI 302.11 (Implied Duty of Good Faith and Fair Dealing), as appropriate, if there is a basis for finding that cooperation was required.

Use the last paragraph to instruct the jury regarding the application of the excuse of interference with contractual performance to the facts of the case.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

COMMENT

In every contract there is an implied covenant or condition that the parties will "not interfere with each other's performance, but will cooperate in good faith." Jones Assocs., Inc. v. Eastside Props., Inc., 41 Wn.App. 462, 471, 704 P.2d 681 (1985) (citing Lonsdale v. Chesterfield, 99 Wn.2d 353, 357, 662 P.2d 385 (1983)); see also Metro. Park Dist. of Tacoma v. Griffith, 106 Wn.2d 425, 437, 723 P.2d 1093 (1986).

However, the duty of good faith does not extend to obligate a party to accept a material change in the terms of the parties' contract. For further discussion about the implied duty of good faith, see the Comment to WPI 302.11 (Implied Duty of Good Faith and Fair Dealing).

When a party is prevented from performing a contract only by the acts of the other party, that party's non-performance is excused. "One who prevents a thing may not avail himself of the nonperformance which he has occasioned." Payne v. Ryan, 183 Wash. 590, 597, 49 P.2d 53 (1935) (plaintiff excused from compliance with condition precedent); see Jones Assocs., 41 Wn.App. at 471.

See also Restatement (Second) of Contracts § 245 (1981): "Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." If there is a claim by the breaching party that the breach did not "contribute materially" to the non-performance by the injured party, the breaching party has the burden of proof as to that proposition. Restatement (Second) of Contracts § 245 cmt. b (1981); Puget Sound Serv. Corp. v. Bush, 45 Wn.App. 312, 724 P.2d 1127 (1986).

For further discussion of the issues underlying this instruction, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice § 10:10 (3d ed.).

[Current as of April 2021.]

WPI 302.09

EXCUSE OF PERFORMANCE—IMPOSSIBILITY OR IMPRACTICABILITY

A party is excused from performing a promise if the performance has been made impossible or impracticable as a result of a fortuitous event that was unexpected and unavoidable by that party. "Fortuitous" means by chance or accident.

"Impossible or impracticable" means that the promise could not be performed, or could only be performed with extreme and unreasonable difficulty, expense, or risk of injury or loss. The mere fact that the performance became more difficult or expensive than originally anticipated does not in itself establish that the promise was impossible or impracticable to perform.

In this case, (name of party) **was relieved of its duty to** (set forth performance claimed to be excused) **if** (name of party) **proves, by a preponderance of evidence, that performance of its promise was "impossible or impracticable" as defined in this instruction.**

NOTE ON USE

Use this instruction after an initial determination by the court that the evidence and circumstances would warrant a finding of impossibility/impracticability under Washington law. When the doctrine of frustration of purpose is applicable, use WPI 303.10 (Excuse of Performance—Frustration of Purpose) instead.

Adapt the last paragraph to inform the jury of the consequences of a finding of impossibility or impracticability, under the circumstances of the case.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

COMMENT

Role of the jury. The determination of whether to excuse perfor-

mance because of impossibility/impracticability (WPI 302.09) or frustration (WPI 302.10) has been treated as an issue of law for the court, rather than a factual matter to be determined by a jury. Wash. State Hop Producers, Inc., Liquidation Trust v. Goschie Farms, Inc., 112 Wn.2d 694, 773 P.2d 70 (1989); see also Restatement (Second) of Contracts, Introductory Note to Chapter 11, Impracticability of Performance and Frustration of Purpose (1981) ("The question is generally considered to be one of law rather than fact, for the court rather than the jury.").

If the facts are undisputed, and the only issue is whether justice requires that performance be excused, then no instruction to the jury is warranted. However, when there is a factual dispute regarding one or more elements of the test for either doctrine (e.g., whether an event was "fortuitous" or "unexpected"), then it may be appropriate to submit the case to the jury with the relevant instruction, but only after the initial determination that a factual dispute warrants such an instruction.

Impossibility and impracticability. Impossibility of performance excuses a party's performance. The doctrine encompasses both "strict impossibility and impracticability due to extreme and unreasonable difficulty, expense, injury or loss. [However, t]he mere fact that a contract's performance becomes more difficult or expensive than originally anticipated, does not justify setting it aside." Thornton v. Interstate Secs. Co., 35 Wn.App. 19, 29, 666 P.2d 370 (1983); see also Hornback v. Wentworth, 132 Wn.App. 504, 132 P.3d 778 (2006) (change in county regulations prevented promised subdivision of property).

The event that renders performance impossible must be "fortuitous and unavoidable on the part of the promisor." Metro. Park Dist. of Tacoma v. Griffith, 106 Wn.2d 425, 439, 723 P.2d 1093 (1986). It is conceivable that an event might have been anticipated by the promisee, but so long as that event was fortuitous, and unexpected and unavoidable by *the promisor*, the doctrine of impossibility may apply. However, if the promisee claims to have anticipated the event, that would be relevant to whether or not the event was unexpected by the promisor.

When the existence of a specific thing is "necessary for the performance of a contract," the fortuitous destruction of that thing excuses the performance of the promisor unless it has "clearly assumed the risk of its continuous existence." Griffith, 106 Wn.2d at 439. Cf. Restatement (Second) of Contracts, Introductory Note to Chapter 11, Impracticability of Performance and Frustration of Purpose (1981) (court determines whether non-occurrence of the event was "basic assumption" of the parties, taking all circumstances into account, and making judgment as to which party assumed the risk of its occurrence).

It is not necessary that the event be totally unforeseeable, if it was unexpected and unavoidable. Thornton, 35 Wn.App. 19.

Fortuitous event. A fortuitous event is one that occurs by chance or accident. Black's Law Dictionary (11th ed. 2019).

For further discussion of the issues underlying this instruction, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice § 10:16 et seq. (3d ed.).

[Current as of April 2021.]

WPI 302.10

EXCUSE OF PERFORMANCE—FRUSTRATION OF PURPOSE

A party's remaining duties of performance under a contract are excused if the party's principal purpose is substantially frustrated, without that party's fault, by the occurrence of an unforeseen event when the non-occurrence of such an event was a basic assumption on which the contract was made.

In this case, (name of party) **is relieved of the duty to** (set forth performance claimed to be excused) **if** (name of party) **proves, by a preponderance of the evidence, that [his] [her] [its] principal purpose in entering into the contract was substantially frustrated, without** (name of party)**'s fault, by the occurrence of an unforeseen event and that the lack or absence of such occurrence was a basic assumption, by [both] [all] contracting parties, on which the contract was made.**

NOTE ON USE

Use this instruction after an initial determination by the court that the evidence and circumstances would warrant a finding of frustration of purpose under Washington law.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

COMMENT

Although application of the doctrine of frustration of purpose is a question of law, see Felt v. McCarthy, 130 Wn.2d 203, 207, 922 P.2d 90 (1996), the jury may still need to resolve related factual disputes. For further discussion, see the Comment to WPI 302.09 (Excuse of Performance—Impossibility or Impracticability).

Washington courts have adopted Restatement (Second) of Contracts: Discharge by Supervening Frustration § 265 (1981). Felt, 130 Wn.2d at 207; Wash. State Hop Producers, Inc. Liquidation Trust v. Goschie Farms, Inc., 112 Wn.2d 694, 773 P.2d 70 (1989). Restatement (Second) of Contracts § 265 (1981) provides that:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

The instruction uses the term excused, rather than discharged, because it would be more familiar to jurors.

The doctrine requires more than the unforeseeability of the frustrating event; the assumption that a desired objective was possible must "be so completely the basis of the contract that, *as both parties understand,* without it the transaction would make little sense." Felt, 78 Wn.App. at 367 (emphasis added) (citing Weyerhaeuser Real Est. Co. v. Stoneway Concrete, Inc., 96 Wn.2d 558, 637 P.2d 647 (1981)), affirmed, 130 Wn.2d 203, 208–09, 922 P.2d 90 (1996). The doctrine does not apply if the contract discloses an allocation of the risk to one party or the other. Scott v. Petett, 63 Wn.App. 50, 60, 816 P.2d 1229 (1991).

According to the Restatement (Second) of Contracts section 266(2), the principle also applies to facts existing at the time of contracting, of which the party had no reason to know:

> Where, at the time a contract is made, a party's principal purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty of that party to render performance arises, unless the language or circumstances indicate the contrary.

Restatement (Second) of Contracts § 266(2) (1981). Compare WPI 301.08 (Enforceability—Mutual Mistake) and WPI 301.09 (Enforceability—Unilateral Mistake).

[Current as of April 2021.]

WPI 302.11

IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

A duty of good faith and fair dealing is implied in every contract. This duty requires the parties to cooperate with each other so that each may obtain the full benefit of performance. However, this duty does not require a party to accept a material change in the terms of [his] [her] [its] contract.

NOTE ON USE

Use this instruction whenever the jury requires an explanation of the duty of good faith.

If it is not clear from the statement of claims instruction, an additional paragraph should be added to inform the jury of the consequence of their finding that a party breached its duty of good faith. See, e.g., the second paragraph of the instruction in WPI 302.08 (Excuse of Performance—Interference With Contractual Performance).

COMMENT

The "implied duty of good faith and fair dealing" in every contract "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." Badgett v. Sec. State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). This obligation, while prohibiting one party from interfering with the other's performance, does not require a party to "affirmatively assist" the other's performance. State v. Trask, 91 Wn.App. 253, 272–73, 957 P.2d 781 (1998).

Further, the duty of good faith neither obligates a party to accept a material change in the terms of its contract, Betchard-Clayton, Inc. v. King, 41 Wn.App. 887, 890, 707 P.2d 1361 (1985), nor does it "inject substantive terms into the parties' contract." Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement. Barrett v. Weyerhaeuser Co. Severance Pay Plan, 40 Wn.App. 630, 635 n. 6, 700 P.2d 338 (1985). Thus, the duty arises only in connection with terms agreed to by the parties. See Badgett, 116 Wn.2d at 569; Lonsdale v. Chesterfield, 99 Wn.2d 353, 662 P.2d 385 (1983); Miller v. Othello Packers, Inc., 67 Wn.2d 842, 843–44, 410 P.2d 33 (1966); Matson v. Emory, 36 Wn.App. 681, 676 P.2d 1029 (1984); CHG Int'l., Inc. v. Robin Lee Inc., 35 Wn.App. 512, 667 P.2d 1127 (1983).

There is no "free-floating" duty of good faith and fair dealing, unattached to an existing contract; rather, it exists only in relation to performance of a specific contract term. Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 177, 94 P.3d 945 (2004); see also Donald B. Murphy Contractors, Inc. v. King Cnty., 112 Wn.App. 192, 197, 49 P.3d 912 (2002) ("If no [specific] contractual duty exists, there is nothing that must be performed in good faith."); Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wn.App. 732, 738–40, 935 P.2d 628 (1997).

Washington courts generally do not imply a duty of good faith and fair dealing in at-will employment contracts. Trimble v. Wash. State Univ., 140 Wn.2d 88, 96–97, 993 P.2d 259 (2000); Willis v. Champlain Cable Corp., 109 Wn.2d 747, 748 P.2d 621 (1988). Nevertheless, "under some egregious circumstances an implied covenant of good faith may be appropriate" for these contracts. Trimble, 140 Wn.2d at 97.

For further discussion of the issues underlying this instruction, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice § 5:13 (3d ed.).

[Current as of April 2021.]

CHAPTER 303

CONTRACTS—REMEDIES

WPI 303.01 Measure of Expectation Damages—Breach of Contract—No Counterclaim
WPI 303.02 Measure of Expectation Damages—Breach of Contract—Counterclaim
WPI 303.03 Contract—Measure of Damages—Direct Damages—Special Cases
WPI 303.04 Contract—Damages—Lost Profits
WPI 303.05 Contract—Reliance Damages
WPI 303.06 Contract—Mitigation of Damages
WPI 303.07 Contract—Liquidated Damages
WPI 303.08 Contract—Damages

WPI 303.01

MEASURE OF EXPECTATION DAMAGES—BREACH OF CONTRACT—NO COUNTERCLAIM

It is the duty of the court to instruct you as to the measure of damages. [By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.]

In order to recover actual damages, the plaintiff has the burden of proving that the defendant breached a contract with plaintiff, and that plaintiff incurred actual [economic] damages as a result of the defendant's breach, and the amount of those damages.

[If your verdict is for plaintiff on plaintiff's breach of contract claim and] if you find that plaintiff has proved that plaintiff incurred actual damages and the amount of those actual damages, then you shall award actual damages to the plaintiff.

Actual damages are those losses that were reason-

ably foreseeable, at the time the contract was made, as a probable result of a breach. A loss may be foreseeable as a probable result of a breach because it follows from the breach either

(1) in the ordinary course of events, or

(2) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

In calculating the plaintiff's actual damages, you should determine the sum of money that will put the plaintiff in as good a position as plaintiff would have been in if both plaintiff and defendant had performed all of their promises under the contract.

The burden of proving damages rests with the plaintiff and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence. You must be governed by your own judgment, by the evidence in the case, and by these instructions, rather than by speculation, guess, or conjecture.

NOTE ON USE

Use this instruction in a breach of contract action without a counterclaim. When a counterclaim is presented, use WPI 303.02 (Measure of Damages—Breach of Contract—Counterclaim) instead.

Use this instruction when expectation damages are sought, rather than reliance damages. For reliance damages, use WPI 303.05 (Contract—Reliance Damages).

Use this instruction with an explanation of direct damages, as set forth in WPI 303.03 (Contract—Measure of Damages—Direct Damages—Special Cases), as is appropriate to the facts of the case. When there is an evidentiary basis for an award of lost profits, use WPI 303.04 (Contract—Damages—Lost Profits).

Use the limiting adjective "economic" before "damages" in the

second paragraph, unless the case falls within the exceptions noted in the Comment under the heading "Mental Distress."

If a valid liquidated damage clause applies, use WPI 303.07 (Contract—Liquidated Damages) instead of this instruction.

COMMENT

Recoverable damages. The seminal case on contract damages is Hadley v. Baxendale, 9 Ex. 341, 354, 156 Eng. Rep. 145, 151 (1854), in which the court described damages recoverable for a breach of contract as those that:

> may fairly be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it.

See Gaglidari v. Denny's Rests., Inc., 117 Wn.2d 426, 445–46, 815 P.2d 1362 (1991).

Damages in contract actions differ significantly from damages in tort actions. Alejandre v. Bull, 159 Wn.2d 674, 682, 153 P.3d 864 (2007). Purely economic damages are specifically recoverable in contract actions, as opposed to tort actions. Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 828, 881 P.2d 986 (1994). The purpose of damages in a breach of contract action is "not a mere restoration to a former position, as in tort, but the awarding of a sum which is the equivalent of performance of the bargain—the attempt to place the plaintiff in the position he would be in if the contract had been fulfilled . . . ." Rathke v. Roberts, 33 Wn.2d 858, 865, 207 P.2d 716 (1949); accord TMT Bear Creek Shopping Center, Inc., v. Petco Animal Supplies, Inc., 140 Wn.App. 191, 210, 165 P.3d 1271 (2007); Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wn.App. 743, 757 n.3, 162 P.3d 1153 (2007).

On the other hand, damages in contract actions are generally narrower than damages in tort actions in that they are limited to compensation for economic harm or pecuniary loss; see the discussion of mental distress below.

According to the Restatement (Second) of Contracts § 351 (1981):

> (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.

(2) Loss may be foreseeable as a probable result of a breach because it follows from the breach

(a) in the ordinary course of events, or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

(3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

"The amount of damages should reflect what is required to place the [injured party] in the same financial position he would have enjoyed in the absence of the breach." Family Med. Bldg., Inc., v. Dep't of Soc. & Health Servs., 104 Wn.2d 105, 114, 702 P.2d 459 (1985); accord Restatement (Second) of Contracts § 347 (1981). Regarding lost profits, however, see WPI 303.04 (Contract—Damages—Lost Profits) and its Comment.

Reliance damages. As an alternative to the general benefit-of-the-bargain measure of damages for a breach of contract action, an injured party may recover damages based on reliance interest, when that party cannot prove with reasonable certainty what profit would have been made had the contract been performed. Such damages may include expenditures made in preparation for performance, or in performance, minus any loss that the party in breach can prove with reasonable certainty the injured party would have suffered if the contract had been performed. Family Med., 104 Wn.2d at 114. See WPI 303.05 (Contract—Reliance Damages) and its Comment. When such damages are sought, the instruction's next-to-last paragraph should be eliminated.

Mental distress. With certain limited exceptions, no damages are awarded for mental or emotional distress resulting from a breach of contract. Restatement (Second) of Contracts § 353 (1981); DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice § 14:1 (3d ed.). Specifically, damages for mental suffering are not recoverable in a contract action except for certain categories of contracts for which a breach is particularly likely to lead to emotional distress. See Gaglidari, 117 Wn.2d at 443–44 (recoverable for contracts of carriers and innkeepers with passengers and guests; recoverable for contracts for the disposition of bodies or delivery of messages concerning death; not recoverable for contracts of employment). Cf. Wright v. Beardsley, 46 Wash. 16, 89 P. 172 (1907) (recoverable under contract theory for improper burial of child).

Nominal damages. The WPI Committee considered including the following provision in this instruction, but in view of the Washington cases on this subject, determined that it is not appropriate for inclusion in a breach of contract action for damages only:

> [If your verdict is for the plaintiff on plaintiff's claim of breach of contract, then] you will award the plaintiff actual damages or the court will award a small amount of nominal damages.

While the traditional rule is that an action will lie for breach of contract without proof of injury, resulting in nominal damages, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice § 14:3 (3d ed.), there is a line of cases in which Washington courts have held to the contrary, when the suit is for damages only. Ketchum v. Albertson Bulb Gardens, 142 Wash. 134, 139, 252 P. 523 (1927); Sorrel v. Eagle Healthcare, Inc., 110 Wn.App. 290, 296, 38 P.3d 1024 (2002) ("Dismissal of an action for damages where no property rights are involved need not be reversed if damages are nominal. This is because the law does not deal with trifles."); Wilkerson v. Wegner, 58 Wn.App. 404, 793 P.2d 983 (1990) (summary judgment for defendant when proof of any damage entirely speculative in lost opportunity to compete for prize money).

On the other hand, there are Washington cases reciting that nominal damages are appropriate in some cases where there is no proof of substantial damage, see, e.g., Ford v. Trendwest Resorts, Inc., 146 Wn.2d 146, 158, 43 P.3d 1223 (2002) (remanding case for entry of nominal damages on breach of employment contract claim on theory that nominal damages are available in all contract actions "where, from the nature of the case, some injury has been done, the amount of which the proofs entirely fail to show"); Seymour v. Jaffe, 78 Wash. 1, 138 P. 276 (1914) (non-negligent seller, unable to convey real property for failure of title). There are also, however, many cases in which the courts, through various procedural devices, render nominal damage awards in contract actions essentially meaningless. E.g., Lee v. Bergesen, 58 Wn.2d 462, 364 P.2d 18 (1961); Com. Inv. Co. v. Nat'l Bank of Com., 36 Wash. 287, 78 P. 910 (1904); Johnson v. Cook, 24 Wash. 474, 64 P. 729 (1901).

For a detailed discussion of damages issues, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice ch. 14 (3d ed.).

[Current as of April 2021.]

WPI 303.02

MEASURE OF EXPECTATION DAMAGES—BREACH OF CONTRACT—COUNTERCLAIM

It is the duty of the court to instruct you as to the measure of damages. In this case, the plaintiff and the defendant each claim to have suffered damages as a result of a breach of contract by the other. [By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.]

In order for either party to recover actual damages, that party has the burden of proving that the other party breached a contract with the party seeking damages, that the party incurred actual [economic] damages as a result of the other party's breach, and the amount of those damages.

[If your verdict is for the plaintiff on plaintiff's breach of contract claim and] if you find that plaintiff has proved that plaintiff incurred actual damages and the amount of those actual damages, then you shall award actual damages to the plaintiff.

[If your verdict is for the defendant on defendant's breach of contract claim, and] if you find that defendant has proved that defendant incurred actual damages and the amount of those actual damages, then you shall award actual damages to the defendant.

Actual damages are those losses that were reasonably foreseeable at the time the contract was made. A loss may be foreseeable as a probable result of a breach because it follows from the breach either

(1) in the ordinary course of events, or

(2) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

In calculating a party's actual damages, you should determine the sum of money that will put that party in as good a position as that party would have been in if both parties had performed all of their promises under the contract.

The burden of proving damages rests with the party claiming them and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence. In determining an award of damages to either party, you must be governed by your own judgment, by the evidence in the case, and by these instructions, rather than by speculation, guess, or conjecture.

NOTE ON USE

Use this instruction in a breach of contract action with a counterclaim.

See the Note on Use to WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim).

Use the bracketed phrases as appropriate.

When the court determines that a set-off is appropriate, this instruction should generally be given with a verdict form in which the jury spells out the damages awarded to both parties. When an affirmative defense is asserted as a set-off, a separate instruction should be drafted.

COMMENT

For the general measure of damages in a breach of contract action, see the Comment to WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim).

If both parties are awarded damages and a defendant is awarded a set-off that is less than the plaintiff's judgment, the plaintiff is entitled

to judgment for the difference, while the defendant is entitled to judgment when the amount of the defendant's set-off exceeds the plaintiff's judgment. RCW 4.56.060–.070. For specific rules regarding set-offs, see generally RCW 4.32.120–.150, RCW 4.56.050–.075, and CR 13(j) (regarding assignee).

In some types of cases, such as unlawful detainer actions, counterclaims and set-offs may not be allowed unless the court determines that the defendant's claims relate to possession of the property. See, e.g., Heaverlo v. Keico Indus., Inc., 80 Wn.App. 724, 911 P.2d 406 (1996).

Special rules apply to the issue of whether prejudgment interest is available on the whole amount of a liquidated claim, when it is offset by an unliquidated counterclaim, or whether it is available only on the balance remaining after the offset of the unliquidated claim. See, e.g., Jet Boats, Inc. v. Puget Sound Nat'l Bank, 44 Wn.App. 32, 721 P.2d 18 (1986); Robblee v. Robblee, 68 Wn.App. 69, 841 P.2d 1289 (1992) (citing Mall Tool Co. v. Far West Equip. Co., 45 Wn.2d 158, 273 P.2d 652 (1954)).

In some circumstances, a defendant may be entitled to damages on the basis of an affirmative defense, rather than a counterclaim. See, e.g., Seattle First Nat'l Bank, N.A. v. Siebol, 64 Wn.App. 401, 824 P.2d 1252 (1992) (in foreclosure action, borrower entitled to equitable set-off for lost profits on basis of promissory estoppel).

For a detailed discussion of damages issues, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice ch. 14 (3d ed.).

[Current as of April 2021.]

WPI 303.03

CONTRACT—MEASURE OF DAMAGES—DIRECT DAMAGES—SPECIAL CASES

With regard to the breach of contract claim[s] of the [plaintiff] [defendant], in your determination of damages you are to use the following measure of damages, in the amounts proved by the [plaintiff] [defendant]:

(insert the measure of damages appropriate to the type of contract breach).

NOTE ON USE

Use this instruction, spelling out a specific measure of damages, with WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim) or WPI 303.02 (Measure of Expectation Damages—Breach of Contract—Counterclaim), as appropriate. For specific measures of damages in various fact situations, see the Comment below.

Insert the appropriate party designation for the claimant whose measure of damages is being described.

COMMENT

As noted in the Comment to WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim), the purpose of damages in a breach of contract action is "the awarding of a sum which is the equivalent of performance of the bargain—the attempt to place the plaintiff in the position he would be in if the contract had been fulfilled . . . ." Rathke v. Roberts, 33 Wn.2d 858, 865, 207 P.2d 716 (1949). On the other hand, recovery is "limited to the loss he has actually suffered by reason of the breach," and the plaintiff is "not entitled to be placed in a better position than he would have been in if the contract had not been broken." Rathke, 33 Wn.2d at 865.

Direct, or general, damages are those that flow from the breach of a contract "in the ordinary course of events." Restatement (Second) of Contracts § 351(2)(a) (1981). A number of specific rules for measuring such damages in various typical contractual situations have evolved, and should be set forth as applicable, or adapted to similar situations.

Buyer's breach of contract to perform a service. When the

contract was for hauling associated stores' merchandise from Seattle and Tacoma to Spokane, proper measure of damages was the lost net profit on the hauler's operation, defined as the difference between the costs of operation and the contract price for freight in the amount that the jury believed the hauler would have transported during the contract period. Bracy v. United Retail Merchs., 189 Wash. 162, 63 P.2d 491 (1937). When the service provider is an individual, the jury is to deduct from net profit the claimant's wages and earnings from other sources. Bracy, 189 Wash. at 168. Cf. Restatement (Second) of Contracts § 349 cmt. d (1981) (if injured party could have provided additional services, he is entitled to lost profits by virtue of lost volume).

The buyer of hauling services, which breached its agreement to keep the road in adequate repair, was liable for the difference between the actual cost of hauling and the cost of hauling if the road had been in the promised condition. Beeson Bros. v. Chambers, 155 Wash. 564, 285 P. 433 (1930).

Buyer's breach of contract to purchase and install special equipment. A seller is entitled to recover the net profit, i.e., the contract price minus the cost, of the sale and installation of special refrigeration equipment. Rathke, 33 Wn.2d at 865.

Contractor's breach of construction contract—Unfinished or defective construction. An owner may recover from a contractor for unfinished or defective construction, either (1) the reasonable cost of completion of the construction in accordance with the contract, unless such cost exceeds the remaining value of the contract, or (2) the difference between the value the construction would have had and the value of the performance received by the owner. Alpine Indus., Inc., v. Gohl, 30 Wn.App. 750, 758, 637 P.2d 998 (1981) (citing Restatement (First) of Contracts § 346 (1932)); see also Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wn.App. 422, 427–28, 10 P.3d 417 (2000) (citing, inter alia, Restatement (Second) of Contracts §§ 347–48 (1981)).

This rule is consistent with the general principle that if a contract has been substantially performed, the measure of damage for defects in the performance is the cost of remedying the defects. But if the cost of correcting the defects would exceed the amount of the contract, then "it follows that there has not been a substantial performance. In such a case, the proper measure of damages is the difference between the value of the work performed and the value it would have had if the work had been done properly." Alpine Indus., 30 Wn.App. at 759. It is error to instruct jurors that they may award damages for both the cost of repairs and diminished market value. However, the owner may recover both the cost of repairs and, in a proper case, lost profits as special or

consequential damages. Alpine Indus., 30 Wn.App. at 759. See WPI 303.04 (Contract—Damages—Lost Profits).

Employer's breach of contract of employment. An employee who has been injured by an employer's breach of contract of employment is entitled to recover future lost wages for such period of time as the employee is able to prove with reasonable certainty is attributable to the breach. Kohn v. Georgia-Pacific Corp., 69 Wn.App. 709, 850 P.2d 517 (1993). For employment at will contracts, however, different rules apply. See Ford v. Trendwest Resorts, Inc., 146 Wn.2d 146, 43 P.3d 1223 (2002) (holding that "lost earnings cannot measure damages for the breach of an employment at will contract because the parties to such a contract do not bargain for future earnings").

Landlord's breach of covenant regarding use of property. The measure of general damages for breach of a landlord's covenant regarding use of rental property is the difference between the rental value of the premises in the condition of repair or utility required by the covenant and the rental value of the premises in the actual condition of the property. Pappas v. Zerwoodis, 21 Wn.2d 725, 734, 153 P.2d 170 (1944) (covenant to repair roof and walls); Matzger v. Arcade Bldg. & Realty Co., 80 Wash. 401, 141 P. 900 (1914) (interference with access to light and ventilation); Purcell v. Warburton, 70 Wash. 129, 126 P. 89 (1912) (covenant to heat). Cf. Gilmartin v. Stevens Inv. Co., 43 Wn.2d 289, 261 P.2d 73 (1953) (breach by seller of contract to supply water to land, difference between value of land with water and without).

In a proper case, a commercial tenant may also be able to recover lost profits attributable to the breach of the landlord's covenant. See Pappas, 21 Wn.2d 725; WPI 303.04 (Contract—Damages—Lost Profits).

Lessee's breach of lease. When the lessor makes a reasonable effort to mitigate damages, the lessor is entitled to recover rental at the contract rate for the period reasonably necessary to re-rent the premises, plus the difference, if any, between the actual rental rate and the contractual rental rate for the term of the lease. Family Med. Bldg., Inc., v. Dep't of Soc. & Health Servis., 104 Wn.2d 105, 702 P.2d 459 (1985).

For a detailed discussion of damages issues, see DeWolf, Allen & Caruso, 25 Washington Practice, Contract Law and Practice ch. 14 (3d ed.).

[Current as of April 2021.]

WPI 303.04

CONTRACT—DAMAGES—LOST PROFITS

In this case, (insert name of party) claims lost profits. (Name of party)'s damages may include net profits if (name of party) proves with reasonable certainty that net profits would have been earned, but were not earned because of (name of other party)'s breach.

"Reasonable certainty" relates to the fact of damage rather than the amount of damage.

NOTE ON USE

Use this instruction with WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim) or 303.02 (Measure of Expectation Damages—Breach of Contract—Counterclaim), as appropriate.

When appropriate, insert a sentence to describe net profits, such as "Net profits in this case mean the difference between the contract price and plaintiff's costs [times _____]." In some instances, the final phrase should include a specific ascertainable quantity (e.g., the number of months remaining in a contract), while in other cases it may be appropriate to have the jury determine the amount (e.g., the number of units that plaintiff could reasonably have expected to sell during the contract period).

It is preferable to keep this instruction separate from WPI 303.03 (Contract—Measure of Damages—Direct Damages—Special Cases), even where that instruction is given regarding some other item of damage distinguishable from the general instructions regarding contract damages in WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim) and WPI 303.02 (Measure of Expectation Damages—Breach of Contract—Counterclaim). The reason is that the "reasonable certainty" requirement applies only to the fact of lost profits, and therefore warrants separate treatment.

COMMENT

Lost profits may be an item of direct or general damages, see the Comment to WPI 303.03 (Contract—Measure of Damages—Direct Damages—Special Cases), as when the buyer has breached a contract for the

sale of a service, Bracy v. United Retail Merchs., 189 Wash. 162, 63 P.2d 491 (1937), or property, Rathke v. Roberts, 33 Wn.2d 858, 207 P.2d 716 (1949).

When there is an evidentiary basis for recovery of lost profits as special or consequential damages, they may be recovered in addition to the general measure of damages applicable to the type of contract breach in question. See, e.g., Pappas v. Zerwoodis, 21 Wn.2d 725, 153 P.2d 170 (1944) (direct damages of diminished rental value plus consequential damages of tenant's lost profits); Alpine Indus, Inc. v. Gohl, 30 Wn.App. 750, 637 P.2d 998 (1981) (direct damages of cost of repair of construction defect plus consequential damages of lost profits from construction delay). Generally, lost profits are consequential damages only when they would have been generated by transactions that were separate from, but depended upon, the contract that was breached.

The rule regarding lost profits as a matter of special, or consequential, damages stems from Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854). In that case, defendant's delay in shipping a broken shaft to an engineering company resulted in the lengthened closure of plaintiff's mill with attendant loss of profits. The court reversed the jury award of the lost profits as damages, on the ground that an aggrieved party may recover only those damages "as may fairly and reasonably be considered [as] . . . arising naturally, i.e., according to the usual course of things, from such breach of contract itself," or those damages "as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Hadley, 156 Eng. Rep. at 151. As is evident from this quotation from *Hadley*, the requirement of "reasonable certainty" may be related historically to the requirement of "foreseeability," which is already included in WPI 303.01 (Measure of Expectation Damages—Breach of Contract—No Counterclaim) and 303.02 (Measure of Expectation Damages—Breach of Contract—Counterclaim).

The consequential damages rule regarding lost profits applies to the *Hadley* situation of the on-going profits of an enterprise, rather than a profit that may be expected on a single transaction that is the subject of the contract at issue. See Gilmartin v. Stevens Inv. Co., 43 Wn.2d 289, 295, 261 P.2d 73 (1953) (lost "profit" really diminution of value of land from breach of contract to supply water, item of direct damages).

Reasonable certainty requirement. A party is entitled to recover lost profits in a breach of contract action when "(1) they are within the contemplation of the parties at the time the contract was made, (2) they are the proximate result of defendant's breach and (3) they are

proven with reasonable certainty." Tiegs v. Watts, 135 Wn.2d 1, 17, 954 P.2d 877 (1998); Larsen v. Walton Plywood Co., 65 Wn.2d 1, 15, 390 P.2d 677 (1964). "Lost profits cannot be recovered where they are speculative, uncertain and conjectural." Tiegs, 135 Wn.2d at 18. The "reasonable certainty" language appears in many Washington cases, although it has never been defined.

The language may be qualified in several significant respects. First, there are cases permitting latitude in the *amount* of damages once the *fact* of damages has been proved. "The doctrine respecting the matter of certainty, properly applied, is concerned more with the fact of damage than with the extent or amount of damage." Alpine Indus., 30 Wn.App. at 754 (quoting Gaasland Co. v. Hyak Lumber & Millwork, Inc., 42 Wn.2d 705, 712–713, 257 P.2d 784 (1953)). "[W]here the fact of damage is firmly established, the wrongdoer is not free of liability because of difficulty in establishing the dollar amount of damages." Reefer Queen Co. v. Marine Constr. & Design Co., 73 Wn.2d 774, 781, 440 P.2d 448 (1968). "Difficulty in ascertaining the damages, or uncertainty as to the amount, provides no basis in logic for denial *in toto*." Sposari v. Matt Malaspina & Co., 63 Wn.2d 679, 689, 388 P.2d 970, 975 (1964). "If the evidence affords a reasonable basis for establishing the loss, an issue arises to be resolved by the trier of facts." Sposari, 63 Wn.2d at 689.

A second qualification of the "reasonable certainty" language relates to apportionment of damages among different causes. "[A]bsolute certainty is not required" when "the amount of damage is not susceptible of exact apportionment between the defendant's fault and other factors contributing to the loss." Alpine Indus., 30 Wn.App. at 755. If a plaintiff claiming lost profit damages "proves that the defendant's fault was a cause of lost profits, the plaintiff is not required to prove the entire loss was due to the defendant's fault." Alpine Indus., 30 Wn.App. at 755. Again, "[t]he trier of fact must exercise a large measure of responsible and informed discretion where the fact of damage is proved." Long v. T-H Trucking Co., 4 Wn.App. 922, 927, 486 P.2d 300 (1971).

A third qualification of the "reasonable certainty" language relates to the "new business rule." In some cases, the rule precludes recovery of lost profits for a new business without a profit history or records of similarly situated businesses. See, e.g., Farm Crop Energy v. Old Nat'l Bank of Wash., 109 Wn.2d 923, 750 P.2d 231 (1988).

For a detailed discussion of damages issues, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice ch. 14 (3d ed.).

[Current as of April 2021.]

WPI 303.05

CONTRACT—RELIANCE DAMAGES

[If you find (insert appropriate predicate, if reliance damages are an alternative option for jury)**, then] the plaintiff has the right to recover damages which would place the plaintiff in the same position as if the contract had never been entered into.**

You are to calculate the reasonable expenditures made by [the plaintiff] in reliance on [the defendant's] [promise] [conduct], subtracting the value of any benefits that [the plaintiff] obtained as a result of those expenditures, and also subtracting the amount of any loss that [the defendant] proves [the plaintiff] would have sustained had the contract been performed.

NOTE ON USE

Use this instruction when a contract is based upon promissory estoppel, or in other instances when the jury may award reliance damages. When reliance damages are presented as an alternative to expectation damages, insert an appropriate predicate, describing the circumstances under which the jury is to award reliance damages, so that the jury understands that it is not to award both.

Substitute the appropriate party designations for the party terms in brackets, or insert the parties' names. Use either "promise" or "conduct," depending upon the circumstances of the case.

COMMENT

This instruction may be appropriate when the contract that is breached is based upon promissory estoppel. See RCM Supply Co., Inc. v. Hunter Douglas, Inc., 686 F.2d 1074, 1078–79 (4th Cir. 1982); see also Silverdale Hotel Assocs. v. Lomas & Nettleton Co., 36 Wn.App. 762, 677 P.2d 773 (1984).

Reliance damages may also be appropriate when lost profits cannot be proved with reasonable certainty or do not exist. See Restatement (Second) of Contracts § 346 (1981); Farm Crop Energy, Inc. v. Old Nat'l Bank of Wash., 109 Wn.2d 923, 750 P.2d 231 (1988) (plaintiff limited to reliance damages on basis of "new business rule").

> As an alternative to the measure of damages stated in § 347 [benefit of bargain], the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.

Restatement (Second) of Contracts § 349 (1981).

For a detailed discussion of damages issues, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice ch. 14 (3d ed.).

[Current as of April 2021.]

WPI 303.06

CONTRACT—MITIGATION OF DAMAGES

A plaintiff who sustains damage as a result of a defendant's breach of contract has a duty to minimize the loss suffered by plaintiff. The plaintiff is not entitled to recover for any part of the loss that plaintiff could have avoided with reasonable efforts. The defendant has the burden to prove the plaintiff's failure to use reasonable efforts to minimize the loss suffered by plaintiff, and the amount of damages that could have been minimized or avoided.

[The plaintiff may recover expenses connected with reasonable efforts to avoid loss.]

NOTE ON USE

Use this instruction in a contract case involving a claim of failure to mitigate damages. Compare WPI 33.01 (Avoidable Consequences—Personal Injury Generally). Use the last bracketed sentence when there is an evidentiary basis for awarding expenses of mitigation.

Party designations should be changed when appropriate to the case. Often, the best solution will be to insert the names of the parties instead of their designations.

COMMENT

Restatement (Second) of Contracts § 350 (1981), entitled "Avoidability as a Limitation on Damages," provides:

> (1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.
>
> (2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.

See also Pub. Util. Dist. No. 2 of Pacific Cnty. v. Comcast of Wash. IV, Inc., 184 Wn.App. 24, 336 P.3d 65 (2014) (trial court properly denied reduction based on alleged failure to mitigate damages).

In appropriate cases, the pattern instruction may need to be modified to refer to the "undue risk, burden or humiliation" language from the Restatement (Second) of Contracts subsection (1), or to the "reasonable but unsuccessful efforts to avoid loss" language from the Restatement (Second) of Contracts subsection (2).

The party alleging that the damages should have been mitigated has the burden of proof on the issue. Pub. Util. Dist. No. 2, 184 Wn.App. 24; Robblee v. Robblee, 68 Wn.App. 69, 841 P.2d 1289 (1992).

The duty to mitigate will not arise, or may be suspended, if there is a basis for a reasonable belief by the injured party that the breaching party will perform. See cases involving repeated promises to perform, e.g., Sears, Roebuck & Co. v. Grant, 49 Wn.2d 123, 298 P.2d 497 (1956); Beeson Bros. v. Chambers, 155 Wash. 564, 285 P. 433 (1930).

The injured party is entitled to recover expenses associated with reasonable efforts to mitigate damages. Family Med. Bldg., Inc., v. Dep't of Soc. & Health Servs., 104 Wn.2d 105, 702 P.2d 459 (1985) (landlord's expenses of remodeling specialized premises in order to relet); City of Puyallup v. Hogan, 168 Wn.App. 406, 277 P.3d 49 (2012) (trial court properly rejected landlord's defense of failure to mitigate based on tenant's declining to renew lease after condemnation).

For a detailed discussion of damages issues, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice ch. 14 (3d ed.).

[Current as of April 2021.]

WPI 303.07

CONTRACT—LIQUIDATED DAMAGES

The parties to a contract may provide in advance for the amount of damages that are to be paid in the event of a breach. These damages are known as "liquidated damages."

In this case, the parties have agreed that if you find a breach of contract [by (insert party)], you are to award liquidated damages in the amount of (insert amount).

NOTE ON USE

Use this instruction when the court has determined that there is an applicable, enforceable liquidated damage clause. Use the bracketed phrase, with elaboration if necessary, if the clause is applicable to a particular breach and more than one breach is at issue.

COMMENT

Liquidated damage clauses are favored in Washington and will be upheld if the amounts involved do not amount to a penalty or are not otherwise unlawful. Watson v. Ingram, 124 Wn.2d 845, 850, 881 P.2d 247 (1994); Buchanan v. Kettner, 97 Wn.App. 370, 984 P.2d 1047 (1999).

A liquidated damage clause is enforceable as long as it is a "reasonable forecast of just compensation" and the proof of loss will be impossible or very difficult. Watson, 124 Wn.2d at 850; Lee v. Bergesen, 58 Wn.2d 462, 464, 364 P.2d 18 (1961). A liquidated damage clause that does not meet these tests will be found to be unenforceable as a penalty for breach. See Restatement (Second) of Contracts § 356 (1981).

The reasonableness of the loss is measured against what could have been anticipated at the time of the making of the contract, rather than as against the actual loss. Restatement (Second) of Contracts, § 356 cmt. b (1981). The greater the difficulty in anticipating the amount of loss at the time the contract is made, the greater the range which will be judged to be "reasonable" as of that time. Watson, 124 Wn.2d at 853.

For a detailed discussion of damages issues, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice ch. 14 (3d ed.).

[Current as of April 2021.]

WPI 303.08

CONTRACT—DAMAGES

If you find (insert required predicate, such as quasi contract or quantum meruit, cancellation of contract, etc.), **then in order to prevent unjust enrichment of the [defendant], [plaintiff] is entitled to [restitution] [or] [the restoration of any benefit conferred on the [defendant]].**

[Restitution means that the [plaintiff] is entitled to the reasonable value to the [defendant] of the [services rendered] [goods delivered] [property conveyed] to the [defendant] [subtracting the reasonable value of any performance received by the plaintiff]. [You may consider, but are not bound by, the contract price as evidence of the value of the [services] [goods] [property].]]

[Restoration of the benefit conferred is measured by either the amount which the benefit would have cost had the defendant obtained the benefit from some other person in plaintiff's position, or alternatively by the extent to which the defendant has benefitted.]

NOTE ON USE

Use this instruction when restitution or restoration of the benefit conferred is an appropriate measure of damages, and the judge has elected to submit the issue to the jury. See the Comment below. Substitute the injured party for the bracketed plaintiff, and the party receiving the benefit or unjust enrichment for the bracketed defendant.

Use the second and/or third paragraph depending on the measure of damages the judge has elected to submit to the jury.

Use the last bracketed sentence of the second paragraph when restitution will be submitted to the jury and is sought in lieu of an unenforceable or cancelled contract.

Use other bracketed sections as appropriate.

This instruction may appropriately be combined with WPI 301A.02 (Quasi Contract), but it may also be used as an alternative remedy for breach of contract; see the Comment below.

COMMENT

This instruction has been modified for this edition to define "restoration of the benefit," and to clarify that the judge should determine the measure of damages to be submitted to the jury.

Although generally an equitable remedy, the court may elect to submit the issue to a jury because there is a mixture of equitable and legal issues in the case, or in order to obtain an advisory ruling.

Contract implied in law/quasi contract/action for restitution/action for unjust enrichment. A contract "implied in law," or quasi-contract, is also called an action for restitution, or an action for unjust enrichment. Young v. Young, 164 Wn.2d 477, 191 P.3d 1258 (2008); Davenport v. Wash. Educ. Ass'n, 147 Wn.App. 704, 197 P.3d 686, 697 (2008); Auburn Mech., Inc. v. Lydig Constr., Inc., 89 Wn. App. 893, 951 P.2d 311 (1998). Cases rely on both the law of contracts, Restatement (Second) of Contracts §§ 370–71, and the Restatement (Third) of Restitution and Unjust Enrichment (2011). Restitution and unjust enrichment are both substantive bases of liability and methods of recovery. Davenport, 147 Wn.App. 704; Young, 164 Wn.2d 477.

Restitution has been described as:

> the modern designation for the older doctrine of "quasi-contracts." "Quasi-contracts" are not true contracts but are obligations created by the law when money or property has been placed in one person's possession, under such circumstances that in equity and good conscience, he ought not to retain it.

Bill v. Gattavara, 34 Wn.2d 645, 650, 209 P.2d 457 (1949); see Davenport, 147 Wn.App. 704 (retention by teachers' union of agency-shop fees deducted from salaries of nonmembers in order to finance political expenditures gave rise to claim for restitution).

This obligation may be contrary to the intention of either one, or both, of the parties. Chandler v. Wash. Toll Bridge Auth., 17 Wn.2d 591, 601, 137 P.2d 97 (1943).

Measure of damages—contract implied in law/quasi contract/action for restitution/action for unjust enrichment. The Restatement (Second) of Contracts defines a party's "restitution interest" as "having restored to it any benefit that it has conferred on the other party." Restatement (Second) of Contracts § 370 cmt. a (1981). Section 371 defines the value to the receiving party as either (a) the value of what it would have cost the receiving party to obtain the benefit from

someone in claimant's position or (b) the extent to which the value of the receiving party's property or interest has been increased. Restatement (Second) of Contracts § 371 (1981). In Young v. Young, 164 Wn.2d. 477, 191 P.3d 1258 (2008), the benefit conferred to defendant by plaintiff's improvement to her land was either the amount defendant would have had to spend to obtain the benefit elsewhere ($760,382) or the extent to which the defendant's property was increased in value or her interests advanced ($750,000–$1,050,000). Because of the equitable nature of these causes of action, there is a question whether there is a role for a jury in deciding them. Washington courts have not decided whether the judge must select only one measure of damages to submit to the jury. See Comment to WPI 301A.02 (Quasi Contract).

A person confers a "benefit" upon another if he or she: performs services beneficial to, or at least at the request of, the other; gives to the other possession of or interest in money, land, chattels or choses in action; or, satisfies a debt or duty of the other; or in any way adds to the security or advantage of the other. Chandler, 17 Wn.2d at 602–03. Nevertheless, even when a person has received a benefit from another, he or she is only liable to pay for it when the circumstances are such that between the two, it is "unjust" to retain it without paying restitution. Chandler, 17 Wn.2d at 601.

Quantum meruit/contract implied in fact. Quantum meruit denotes recovery for the value of services or materials provided under an actual implied-in-fact contract where: 1) the defendant requests the work; 2) plaintiff expects pay for the work; and 3) defendant knows or should know plaintiff expects pay. Quantum meruit means literally "what he deserves" or a reasonable amount for work done. Under a contract implied in fact, recovery is limited to the value of services rendered. Young, 164 Wn.2d. 477.

Quantum meruit has been allowed when one party's performance occurs in the absence of a contract, Losli v. Foster, 37 Wn.2d 220, 222 P.2d 824 (1950), or when a substantial change not within the contemplation of the parties occurs with a resulting benefit to one and expense to the other. Heaton v. Imus, 93 Wn.2d 249, 608 P.2d 631 (1980).

Recovery in quantum meruit was denied when the plaintiff had performed services under a contingent contract with another, with benefits incidentally conferred upon the defendant. The plaintiff did not receive payment for the services when the contingency did not materialize, but that was a risk for which he had contracted. Chandler, 17 Wn.2d at 601.

Alternate remedy for breach of contract. In a pre-U.C.C. case,

the court found that a buyer of a product that is not as warranted by the seller may elect to rescind the contract, refuse the product, and recover any money paid on the purchase price, or in freight, in restitution. This is an alternative remedy to accepting the product and offsetting the purchase price with damages resulting from the breach. Houser & Haines Mfg. Co. v. McKay, 53 Wash. 337, 101 P. 894 (1909).

Restitution is not available for breach of a fully performed contract when the only outstanding performance is the payment of money. Restatement (Second) of Contracts § 373(2) (1981); Kofmehl v. Baseline Lake, LLC, 177 Wn.2d 584, 305 P.3d 230 (2013) (trial court erroneously dismissed claim for return of earnest money when evidence conflicted as to whether vendor was ready, willing, and able to perform). The basic aim of restitution is to place the plaintiff in the same economic position as he or she enjoyed prior to contracting. DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice § 14:7 (3d ed.).

For a detailed discussion of damages issues, see DeWolf, Allen, & Caruso, 25 Washington Practice, Contract Law and Practice ch. 14 (3d ed.). See also the Restatement (Third) of Restitution and Unjust Enrichment (2011).

[Current as of November 2021.]

PART XIV

CONSUMER PROTECTION

CHAPTER 310

CONSUMER PROTECTION ACTIONS

WPI 310.00 Consumer Protection Act—Introduction
WPI 310.01 Elements of a Violation of the Consumer Protection Act
WPI 310.02 Reasonableness Defense to Consumer Protection Act Claim
WPI 310.03 *Per Se* Violation of Consumer Protection Act
WPI 310.06 Injury in Consumer Protection Act Claim
WPI 310.07 Causation in Consumer Protection Act Claim
WPI 310.08 Definition—Unfair or Deceptive Act or Practice
WPI 310.09 Definition—Trade or Commerce

WPI 310.00

CONSUMER PROTECTION ACT—INTRODUCTION

Coverage of chapter. These consumer protection instructions cover only cases brought under the unfair or deceptive acts or practices aspects of the Unfair Business Practices Act—Consumer Protection Act (CPA), RCW Chapter 19.86. Antitrust and unfair competition aspects of the statute are not addressed in these instructions.

Statutory development. The CPA, first enacted in 1961, is Washington's principal consumer protection and antitrust statute. The consumer protection provisions of the CPA were modeled after Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Most states now have such "Little FTC" acts. The heart of the consumer protection provisions of the CPA is RCW 19.86.020, which states: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

In its early form the CPA allowed only actions by the Attorney General on behalf of the state; the state has remedies available to it under RCW 19.86.080 and RCW 19.86.140.

The CPA was later amended to add further remedies. Private rights of action may now be maintained for recovery of actual damages, costs, and a reasonable attorney's fee. RCW 19.86.090. A private plaintiff may be eligible for treble damages: "[T]he court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained." RCW 19.86.090 (capping such increased damages at $25,000 for violations of RCW 19.86.020).

A private plaintiff may also seek injunctive relief. RCW 19.86.090. The purpose of the private right of action is "to enlist the aid of private individuals . . . to assist in the enforcement of the [CPA]." Lightfoot v. MacDonald, 86 Wn.2d 331, 335–36, 544 P.2d 88 (1976). Private consumers may obtain injunctive relief, even if the injunction would not directly affect the individual's own rights. RCW 19.86.090; Hockley v. Hargitt, 82 Wn.2d 337, 349–50, 510 P.2d 1123 (1973). Thus, the private right of action serves the public interest by preventing unfair or deceptive practices from continuing unchecked. Hockley, 82 Wn.2d at 350; see also Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 295 P.3d 1179 (2013) (injunction against foreclosure trustee company restored on appeal).

A plaintiff in a private action under the CPA may also obtain rescission and other equitable remedies. Allen v. Am. Land Rsch., 95 Wn.2d 841, 851–52, 631 P.2d 930 (1981).

Elements. In Hangman Ridge Training Stables, Inc. v. Safeco Title Ins., Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986), the Washington Supreme Court defined the elements of a private CPA "unfair or deceptive acts or practices" action:

> We hold that to prevail in a private CPA action . . . a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.

See the discussion of these elements in the Comments to WPI 310.01 (Elements of a Violation of the Consumer Protection Act) and WPI 310.08 (Definition—Unfair or Deceptive Act or Practice).

***Per se* violations.** The Legislature periodically establishes *per se* violations of one or more elements of a CPA claim by declaring that a violation of a particular statute is a *per se* unfair or deceptive trade practice, which establishes the first two elements, or *per se* affects the public interest, which satisfies element (3), or both. See Hangman, 105 Wn.2d at 792. Examples of such statutes are listed in the Comment to WPI 310.03 (*Per Se* Violation of Consumer Protection Act). See also

WPI 320.06 (Violations of Insurance Regulations Related to Settlement of Claims) for deceptive acts or practices by insurance companies.

A number of statutes that contain an "unfair trade or practice" and "public interest" declaration also contain a declaration that a violation "is not reasonable in relation to the development and preservation of business." See, e.g., RCW 19.170.010(2) (advertising prizes and promotions); RCW 46.71.070 (automotive repair); RCW 19.182.150 (Fair Credit Reporting Act); RCW 49.60.030(3) (Law Against Discrimination). For a list of statutes containing declarations relevant to the CPA, see Appendix H to these instructions. See also the list of cross-referenced statutes in the Code Reviser's notes at the beginning of RCW Chapter 19.86 (http://app.leg.wa.gov/RCW/default.aspx?cite=19.86).

Preemption. The Bankruptcy Appellate Court for the Ninth Circuit has held that the U.S. Bankruptcy Code pre-empts the Washington CPA. In re Chaussee, 399 B.R. 225, 229–34 (9th Cir. BAP 2008).

Insurance bad faith instructions. The WPI instructions regarding insurance bad faith, at WPI Chapter 320, are companions to these instructions, and bad faith by an insurer can be a *per se* violation of the CPA. See WPI 320.00 (Insurance Bad Faith—Introduction).

[Current as of February 2021.]

WPI 310.01

ELEMENTS OF A VIOLATION OF THE CONSUMER PROTECTION ACT

(Insert name of plaintiff) claims that (name of defendant) has violated the Washington Consumer Protection Act. To prove this claim, (name of plaintiff) has the burden of proving each of the following propositions:

(1) That (name of defendant) engaged in an unfair or deceptive act or practice;

(2) That the act or practice occurred in the conduct of (name of defendant)'s trade or commerce;

(3) That the act or practice affects the public interest;

(4) That (name of plaintiff) was injured in either [its] [his] [her] business or [its] [his] [her] property; and

(5) That (name of defendant)'s act or practice was a proximate cause of (name of plaintiff)'s injury.

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if any of these propositions has not been proved, your verdict should be for (name of defendant) [on this claim].

NOTE ON USE

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of Evidence). Use this instruction with WPI 310.02 (Reasonableness Defense to Consumer Protection Act Claim), if appropriate.

If the first two or the first three propositions may be proved by violation of a statute (for example, a Washington statute that makes a violation of that statute a *per se* violation of the Consumer Protection Act), use WPI 310.03 (*Per Se* Violation of Consumer Protection Act).

For a definition of the first proposition, when a statutory violation is not alleged, use WPI 310.08 (Definition—Unfair or Deceptive Act or Practice). For an explanation of trade or commerce in the second proposition, use WPI 310.09 (Definition—Trade or Commerce).

Use optional WPI 310.06 (Injury in Consumer Protection Act Claim) if further explanation of "injured" in the fourth element is necessary or helpful.

For a discussion of causation, see the Comment to WPI 310.07 (Causation in Consumer Protection Act Claim).

COMMENT

In Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 787–93, 719 P.2d 531 (1986), the court set forth the five elements of a Consumer Protection Act claim: (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) public interest; (4) injury to business or property; and (5) causation.

The term "unfair or deceptive" is not otherwise defined in the Act. RCW 19.86.020. In many cases, however, the first element will be met by a statutory violation. See WPI 310.03 (*Per Se* Violation of Consumer Protection Act). Regarding the requirements of a factual proof, see the Comment to WPI 310.08 (Definition—Unfair or Deceptive Act). No intentional deception need be proved, only a capacity or tendency to deceive. State v. A.N.W. Seed Corp., 116 Wn.2d 39, 50, 802 P.2d 1353 (1991); Hangman Ridge, 105 Wn.2d at 785.

When the underlying facts are undisputed, the question whether the acts are likely to deceive—an objective inquiry—is a question of law. State v. Mandatory Poster Agency, Inc., 199 Wn.App. 506, 512, 398 P.3d 1271 (2017). However, whether such a deception has the capacity to reach a substantial portion of the public is a question of fact precluding summary judgment, unless the undisputed facts establish that capacity. Mandatory Poster Agency, 199 Wn.App. at 512.

With regard to unfairness, "an act or practice can be unfair without being deceptive." Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013).

If it is undisputed that the "trade or commerce" element is satisfied, the parties should stipulate that the element is met or the court should so rule, and the jury should be so instructed. If there is an issue regarding this element, give instruction WPI 310.09 (Definition—Trade or Commerce).

The third element, "public interest," is governed by RCW 19.86.093. The statutory language defining "public interest" is set forth in WPI 310.04 (Public Interest Element).

The "business or property" injury in the fourth element may need the additional explanation of optional WPI 310.06 (Injury in a Consumer Protection Act Claim).

The causation requirement in the fifth element is proximate causation. Indoor Billboard/Wash., Inc., v. Integra Telecom of Wash., Inc., 162 Wn.2d 59,170 P.3d 10 (2007); Wash. State Physicians Ins. Exch. & Ass'n. v. Fisons Corp., 122 Wn.2d 299, 314, 858 P.2d 1054 (1993). Causation is addressed in WPI 310.07 (Causation in Consumer Protection Act Claim).

These instructions are intended for "unfair or deceptive acts or practices" cases; they may not be suitable for "unfair methods of competition" cases. RCW 19.86.020. Compare Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 733 P.2d 208 (1987) (implied overruling on other grounds recognized in Matsyuk v. State Farm Fire & Cas. Co., 173 Wn.2d 643, 659, 272 P.3d 802 (2012)), with Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 738 P.2d 665 (1987) (differing as to whether *Hangman Ridge* should be applied to unfair competition cases).

The Consumer Protection Act must be liberally construed to protect the public. RCW 19.86.920. However, the CPA is not intended to prohibit acts or practices that are "reasonable in relation to the development and preservation of business." RCW 19.86.920. See WPI 310.02 (Reasonableness Defense to Consumer Protection Act Claim) and its Comment.

[Current as of February 2021.]

WPI 310.02

REASONABLENESS DEFENSE TO CONSUMER PROTECTION ACT CLAIM

The Consumer Protection Act does not prohibit acts or practices that are reasonable in relation to the development and preservation of business or that are not injurious to the public interest.

NOTE ON USE

Use with WPI 310.01 (Elements of a Violation of the Consumer Protection Act), if appropriate.

Use the instruction cautiously. It does not apply in every case, and jurors may have difficulty integrating it with the other instructions on this claim. See the Comment below.

COMMENT

This instruction is based on RCW 19.86.920.

RCW 19.86.920 does not specify who bears the burden of proving reasonableness. The statute gives no indication whether reasonableness is an affirmative defense, a simple defense, or something else. Case law refers to reasonableness as a defense but has not addressed the burden of proof. See Travis v. Wash. Horse Breeders Ass'n, 111 Wn.2d 396, 408–09, 759 P.2d 418 (1988); Stephens v. Omni Ins. Co., 138 Wn.App. 151, 170, 159 P.3d 10 (2007), affirmed on different issues, Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 204 P.3d 885 (2009); Cox v. Lewiston Grain Growers, 86 Wn.App. 357, 373, 936 P.2d 1191 (1997). Because of this uncertainty, the instruction does not include a burden of proof. Absent a burden of proof, jurors may find it difficult to fit the instruction into the framework of the plaintiff's required elements.

Jurors may also have difficulty balancing the policy interests involved in this instruction. In most cases, this difficulty can be avoided because the issue of reasonableness will be decided by the judge as a matter of law during pre-trial motions. See, e.g., Univ. of Wash. v. Gov't Emps. Ins. Co., 200 Wn.App. 455, 404 P.3d 559 (2017). In some cases, however, material issues of fact will exist that need to be submitted to the jury. See Stephens, 138 Wn.App. at 170; Travis, 111 Wn.2d at 408–09.

Defenses to the CPA must be read in conjunction with the language

in RCW 19.86.920 directing courts to liberally construe the CPA. When the Legislature calls for a statute to be liberally construed, its exemptions must be narrowly confined. Vogt v. Seattle-First Nat'l Bank, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991).

A number of statutes that contain an "unfair trade or practice" and "public interest" declaration also contain a declaration that a violation "is not reasonable in relation to the development and preservation of business." See, e.g., RCW 19.170.010(2) (advertising prizes and promotions); RCW 46.71.070 (automotive repair); RCW 19.182.150 (Fair Credit Reporting Act); RCW 49.60.030(3) (Law Against Discrimination). For a list of statutes containing declarations relevant to the CPA, see Appendix H to these instructions. See also the list of cross-referenced statutes in the Code Reviser's notes at the beginning of RCW Chapter 19.86 (http://app.leg.wa.gov/RCW/default.aspx?cite=19.86).

[Current as of February 2021.]

WPI 310.03

PER SE VIOLATION OF CONSUMER PROTECTION ACT

A violation of the statute relating to (briefly describe the statute's subject matter) **is an unfair or deceptive act or practice in the conduct of** (name of defendant)'s **trade or commerce. [A violation of this statute also affects the public interest.]**

This statute provides as follows:

(Insert a brief description of the requirements of the statute.)

If you find that a violation of this statute has occurred, then you must find that the first [two] [three] elements of a Consumer Protection Act violation have been proved.

NOTE ON USE

Use when the plaintiff alleges violation of a statute or regulation that is, by its terms, a *per se* violation of the Consumer Protection Act.

When a statute declares that its violation constitutes an unfair or deceptive act or practice, use the first sentence of the instruction. When the statute also contains a declaration that violation of the statute affects the public interest, use the bracketed sentence, and "three elements" in the last paragraph of the instruction. In the less common situation when the statute has a *per se* violation provision but no public interest declaration, use the alternative for two elements. In the uncommon situation when the statute contains only a public interest declaration, use only the bracketed alternative, and adjust the final paragraph accordingly.

See the Comment below for examples of statutes with such declarations. For *per se* violations of the CPA by violation of insurance regulations, use WPI 320.06 (Violation of Insurance Regulations Related to Settlement of Claims).

COMMENT

Under Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 786, 719 P.2d 531 (1986), there are two types of

statutory declarations that might constitute a *per se* violation of elements of the Consumer Protection Act: (a) a "*per se* unfair trade practice . . . when a statute has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce," or "unfair trade practice," satisfying the first two elements of a CPA cause of action, and (b) a separate public interest declaration, satisfying the third element. See WPI 310.01 (Elements of a Violation of the Consumer Protection Act); see also Wright v. Lyft, Inc., 189 Wn.2d 718, 406 P.3d 1149 (2017); Campbell v. Seattle Engine Rebuilders & Remfg., Inc., 75 Wn.App. 89, 876 P.2d 948 (1994) (public interest requirement must be met independently).

Examples of statutes with both an "unfair or deceptive act or practice in trade or commerce" declaration and a "public interest" declaration are: RCW 18.11.260 (auctions), RCW 19.158.010 and .030 (commercial telephone solicitation), RCW 19.170.010 (advertising prizes and promotions), RCW 19.182.150 (Fair Credit Reporting Act), RCW 19.250.040 (personal wireless numbers), RCW 26.33.400(3) (adoption advertising), RCW 31.45.190 (check cashers), RCW 46.70.310 (formerly Unfair Motor Vehicle Practices—Dealers' Licenses), RCW 46.71.070 (automotive repair), RCW 49.60.030(3) (discrimination, civil rights), RCW 63.10.050 (consumer leases of motor vehicles), and RCW 80.36.400(3) (automatic dial answer services).

Examples of statutes with only an "unfair or deceptive act or practice" declaration include: RCW 18.185.210 (bail bond agents), RCW 19.16.440 (collection agencies), RCW 19.100.190 (franchises), RCW 19.110.170 (business opportunity fraud), RCW 19.134.070(5) (credit service agencies), RCW 19.275.040 (pyramid schemes), and RCW 64.36.330 and .170 (time share sales).

A number of statutes that contain an "unfair trade or practice" and "public interest" declaration also contain a declaration that a violation "is not reasonable in relation to the development and preservation of business." See, e.g., RCW 19.170.010(2) (advertising prizes and promotions); RCW 19.182.150 (Fair Credit Reporting Act); RCW 46.71.070 (automotive repair); RCW 49.60.030(3) (Law Against Discrimination). For a list of statutes containing declarations relevant to the CPA, see Appendix H to these instructions. See also the list of cross-referenced statutes in the Code Reviser's notes at the beginning of RCW Chapter 19.86 (http://app.leg.wa.gov/RCW/default.aspx?cite=19.86).

[Current as of February 2021.]

WPI 310.06

INJURY IN CONSUMER PROTECTION ACT CLAIM

(Insert name of plaintiff) has suffered an "injury" if [his] [her] [its] business or property has been injured to any degree. Under the Consumer Protection Act, (name of plaintiff) has the burden of proving that [he] [she] [it] has been injured, but no monetary amount need be proved and proof of any injury is sufficient, even if expenses or losses caused by the violation are minimal.

[Injuries to business or property do not include physical injury to a person's body, or pain and suffering.]

[Injuries to business or property, if any, include: [financial loss] [loss of professional business reputation] [loss of goodwill] [difficulty in securing a loan or other credit] [time away from work] [(insert other applicable type of injury to business or property)] [inability to tend to business establishment].]

NOTE ON USE

This is an optional instruction to be used when the jury would benefit from a supplemental instruction on the definition of "injury to business or property." Add the bracketed language of the second and third paragraphs if there is evidence to support its use.

COMMENT

Under Washington's Consumer Protection Act, injury is separate from damages, therefore quantifiable monetary loss is not required. Frias v. Asset Foreclosure Servs., Inc., 181 Wn.2d 412, 431, 334 P.3d 529 (2014).

In Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 792, 719 P.2d 531 (1986), the court discussed the nature of injury to "business or property." Non-quantifiable injuries such as loss of good will are sufficient to establish the required injury; even minimal damages are sufficient. Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1135–36 (9th Cir. 2016) (failure to disclose certain job opportunities created sufficient grounds for CPA claim); Mason v. Mortg. Am.,

Inc., 114 Wn.2d 842, 792 P.2d 142 (1990) (injury as result of loss of use of property); Handlin v. On-Site Manager, Inc., 187 Wn.App 841, 849–51, 351 P.3d 226 (2015) (withholding credit report used to deny rental housing is injury); Sorrel v. Eagle Healthcare, 110 Wn.App. 290, 298, 38 P.3d 1024 (2002) (injury by delay in refund of money).

"Injury" includes the costs of investigation, and the time needed to conduct that investigation, in response to a defendant's misleading communication about amounts owed to the defendant. Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 40, 57–65, 204 P.3d 885 (2009); see also Stephens v. Omni Ins. Co., 138 Wn.App. 151, 159 P.3d 10 (2007), affirmed on different issues, Panag, 166 Wn.2d 27 (loss of time and expense of investigating validity of claim qualify as injury to business or property).

"Injury" also includes an insured's settlement agreement, even if it includes a covenant not to execute, as the agreement can impair the insured's credit rating or lead to damage to reputation and loss of business opportunities. Moratti v. Farmers Ins. Co., 162 Wn.App. 495, 254 P.3d 939 (2011); see also Williams v. Lifestyle Lift Holdings, Inc., 175 Wn.App 62, 73–74, 302 P.3d 523 (2013) (cost of surgery even if performed competently is injury, if surgery undertaken because of deceptive marketing).

On the other hand, expenses of litigating a personal injury claim do not constitute "injury." Panag, 166 Wn.2d at 40–41. For further discussion of injuries to business or property, see DeWolf & Allen, 16 Washington Practice, Tort Law & Practice § 8.9 (5th ed.).

While the injury to business or property involved in a claim under the Washington Consumer Protection Act (CPA) need not be great, some injury must be established. Cousineau v. Microsoft Corp., 992 F.Supp.2d 1116, 1128 (W.D. Wash. 2012) (smart phone user's allegation that phone manufacturer's unauthorized transmission of data to its server caused a diminution in users' data plans was too nebulous to demonstrate injury absent an allegation the user paid a wireless carrier for a finite allowance rather than an unlimited usage plan).

Pain and suffering are "personal injuries" as opposed to injuries to "business or property." Personal injuries are not compensable damages under the Consumer Protection Act. Ambach v. French, 167 Wn.2d 167, 216 P.3d 405 (2009); White River Estates v. Hiltbrunner, 134 Wn.2d 761, 765 n.1, 953 P.2d 796 (1998); Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 318, 858 P.2d 1054 (1993).

The court has discretion to treble the plaintiff's damages: "[T]he court may, in its discretion, increase the award of damages up to an

amount not to exceed three times the actual damages sustained." RCW 19.86.090 (capping such increased damages at $25,000 for violations of RCW 19.86.020).

[Current as of February 2021.]

WPI 310.07

CAUSATION IN CONSUMER PROTECTION ACT CLAIM

(Insert name of plaintiff) **has the burden of proving that** (name of defendant)'s **unfair or deceptive act or practice was a proximate cause of** (name of plaintiff)'s **injury.**

"Proximate cause" means a cause which in direct sequence [unbroken by any new independent cause] produces the injury complained of and without which such injury would not have happened.

[There may be more than one proximate causes of an injury.]

NOTE ON USE

Use this instruction to explain causation. If multiple causation is an issue, see the Comment below. Use bracketed material as applicable.

Use with WPI 24.05 (Presumptions—Rebuttable Mandatory—Which Affect the Burden of Proof (When Presumed Fact Constitutes a Jury Question)) if applicable. See Comment below for further discussion.

COMMENT

The Washington Supreme Court has approved of WPI 15.01 (Proximate Cause—Definition) and WPI 310.07 as accurate proximate cause instructions for use in CPA cases. Schnall v. AT&T Wireless Servs., Inc., 171 Wn.2d 260, 277–80, 259 P.3d 129 (2011), relying on Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 83–84, 170 P.3d 10 (2007); see also Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 314, 858 P.2d 1054 (1993) (upholding a jury instruction that required proof that the defendant's unfair or deceptive act proximately caused injury to the plaintiff's business or property).

The traditional definition of "proximate cause" in WPI 15.01 (Proximate Cause—Definition) is incorporated in this instruction. For alternative definitions of "proximate cause," see WPI Chapter 15 (Proximate Cause). The third paragraph in the instruction section was modified for this edition to be more consistent with WPI 15.01 (Proximate Cause—Definition). No substantive change is intended.

Substantial factor test. The Court of Appeals rejected a jury instruction using the "substantial factor" test for causation in a CPA trial when there was no showing of two inseparable causes. See Sharbono v. Universal Underwriters Ins. Co., 139 Wn.App. 383, 161 P.3d 406 (2007).

Causal link. The required causal link is between the defendant's deceptive act and the plaintiff's injury. Schnall, 171 Wn.2d at 277; Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 61, 204 P.3d 885 (2009); Schmidt v. Cornerstone Inv., Inc., 115 Wn.2d 148, 167, 795 P.2d 1143 (1990). This causal link is not necessarily broken by the existence of an intermediary between the plaintiff and the defendant. See Schmidt, 115 Wn.2d at 167–68 (holding that the necessary causal link between a defendant's inflated property appraisal and the plaintiff's injury may still exist even if the defendant had no direct contact with the plaintiff).

Causation in cases involving affirmative misrepresentations. In cases involving affirmative misrepresentations of facts, the plaintiff is not required to show that he or she relied on the misrepresentations. The Supreme Court has "firmly rejected the principle that reliance is necessarily an element of the plaintiff's [CPA] case." Schnall, 171 Wn.2d at 277; see Indoor Billboard, 162 Wn.2d at 78–84 (rejecting the former test of reliance/inducement, holding that the former test did not survive the *Hangman Ridge* case). Instead, the plaintiff is required to meet the general requirements of proximate causation: "We hold that the proximate cause standard embodied in WPI 15.01 is required to establish the causation element in a CPA claim." Schnall, 171 Wn.2d at 278; Indoor Billboard, 162 Wn.2d at 83–84.

According to both *Schnall* and *Indoor Billboard*, a plaintiff does not meet the test of proximate causation merely by showing that the defendant made an affirmative misrepresentation and that the plaintiff thereafter purchased the defendant's product or services. Schnall, 171 Wn.2d at 277; Indoor Billboard, 162 Wn.2d at 83–84. Rather, the plaintiff must show that the plaintiff's injury would not have occurred but for the defendant's misrepresentation, and that the injury occurred in a direct causal sequence with the misrepresentation.

Causation in cases involving failure to disclose facts. In *Indoor Billboard*, the Washington Supreme Court distinguished affirmative misrepresentations from failures to disclose facts. Because of the difficulty in proving reliance in a failure to disclose case, the Court of Appeals adopted a rebuttable presumption of reliance under the CPA for omissions of material facts claims, citing rebuttable presumptions of reliance applied by federal courts in CPA failure to disclose cases and

adopted by the Washington Supreme Court in franchise fraud and security fraud cases. Deegan v. Windemere Real Est./Center-Isle, Inc., 197 Wn.App. 875, 885–86, 890, 391 P.3d 582 (2017).

No case has clearly addressed whether the rebuttable presumption of reliance is resolved by the trial court as a matter of law, or by the jury through an instruction, thereby shifting the burden of production and persuasion to the defendant as a question of fact. Cf. Spivey v. City of Bellevue, 187 Wn.2d 716, 734–35, 389 P.3d (2017) (holding jury properly instructed on rebuttable presumption shifting burden of production and persuasion to defendant where plaintiff otherwise had "impossible burden" of demonstrating occupation actually caused disease); Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 161 Wn.2d 903, 921, 169 P.3d 1 (2007) (holding defendant insurers bear the burden of proof on disproving harm once an insured plaintiff proves bad faith where insured otherwise would bear impossible burden of proving harm); Moratti v. Farmers Ins. Co., 162 Wn.App. 495, 511, 254 P.3d 939 (2011) (jury instructed on rebuttable presumption of harm shifting burden of proof to defendant in insurance bad faith case).

Questions of fact/law. Usually, causation is a question of fact. See Indoor Billboard, 162 Wn.2d at 83–84; Carlile v. Harbour Homes, 147 Wn.App. 193, 214–15, 194 P.3d 280 (2008); Shah v. Allstate Ins. Co., 130 Wn.App. 74, 85–86, 121 P.3d 1204 (2005). If the links in the chain of causation show that the connection between defendant's act or practice and plaintiff's alleged injury is too remote, then lack of causation may be decided by the trial court as a matter of law. Fidelity Mortg. Corp. v. Seattle Times Co., 131 Wn.App. 462, 470–71, 128 P.3d 621 (2005). The test for remoteness is:

> (1) [W]hether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct, and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.

Fidelity Mortgage, 131 Wn.App. at 470–71; see also Browne v. Avvo, Inc., 525 F. Supp.2d 1249, 1255 (W.D. Wash. 2007).

Multiple proximate causes-generally. The WPI Committee is not aware of reported Washington cases involving proximate cause under both general tort liability and the CPA. In general negligence cases, however, the court has held when evidence supports more than one proximate cause, it may be error to use WPI 15.01 (Proximate

Cause—Definition) without the bracketed sentence stating that an event may have one or more proximate causes. Jonson v. Chicago, Milwaukee, St. Paul and Pac. R.R. Co., 24 Wn.App. 377, 380, 601 P.2d 951 (1979) (when evidence supports multiple proximate causes, and a specific request is sought, jury should be instructed, "[a]n event may have one or more proximate causes").

[Current as of September 2021.]

WPI 310.08

DEFINITION—UNFAIR OR DECEPTIVE ACT OR PRACTICE

In order to prove that (name of defendant) engaged in an unfair or deceptive act or practice, it is sufficient to show that the act or practice had the capacity to deceive a substantial portion of the public. (Name of plaintiff) does not need to show that the act or practice was intended to deceive.

NOTE ON USE

Use this instruction in combination with WPI 310.01 (Elements of a Violation of the Consumer Protection Act) when the "unfair or deceptive" requirement is not met by a statutory violation.

The instruction defines deceptive acts or practices. For guidance in drafting an instruction that defines unfair acts or practices, see the Comment below.

COMMENT

The term "unfair or deceptive" is not defined in the Consumer Protection Act. RCW 19.86.020. Whether an alleged act constitutes an unfair or deceptive act or practice covered by the CPA is generally a question of law that appellate courts review under the de novo standard. Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., P.L.L.C., 168 Wn.2d 421, 442, 228 P.3d 1260 (2010); Svendsen v. Stock, 143 Wn.2d 546, 553, 23 P.3d 455 (2001). It is a question of fact whether the defendant committed a specific action or practice. Leingang v. Pierce Cty. Med. Bureau, 131 Wn.2d 133, 149–50, 930 P.2d 288 (1997).

Deceptive acts or practices. Whether an act has the capacity to deceive a substantial portion of the public is a question of fact. Behnke v. Ahrens, 172 Wn.App. 281, 294 P.3d 729 (2012). When the underlying facts are undisputed, the question whether the acts are likely to mislead - an objective inquiry - is a question of law. State v. Mandatory Poster Agency, Inc., 199 Wn.App. 506, 512, 398 P.3d 1271 (2017). However, whether such a deception has the capacity to reach a substantial portion of the public is a question of fact precluding summary judgment, unless the undisputed facts establish that capacity. Mandatory Poster Agency, 199 Wn.App. at 512.

If the facts about a party's act or practice are not in dispute, the trial court may decide whether that act or practice was deceptive as a matter of law. Smale v. Cellco P'ship, 547 F. Supp.2d 1181, 1188 (W.D. Wash. 2008); Leingang, 131 Wn.2d at 149–50.

Characterizing an insurance subrogation claim as a liquidated obligation that must be immediately paid, when in fact the claim and alleged debt had not yet been adjudicated, is an act that has a tendency to deceive a substantial portion of the public. Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 47–56, 204 P.3d 885 (2009). Listing a piece of real property and showing the property to potential buyers without disclosing that the property was previously used as a place for manufacturing methamphetamine is an act that has a tendency to deceive a substantial portion of the public. Bloor v. Fritz, 143 Wn.App. 718, 735–37, 180 P.3d 805 (2006) (the court also held that leaving this information out of the seller's disclosure statement could not serve as the basis of a claim under the CPA); see also Svendsen, 143 Wn.2d at 553 (fraudulent concealment by real estate agent constituted a CPA violation).

The definition of "deceptive" involves an objective inquiry—would the practice be likely to mislead a reasonable or ordinary consumer. Behnke, 172 Wn.App. at 292–93 (citing Panag, 166 Wn.2d at 50).

No intentional deception need be proved, only a tendency or capacity to deceive. Sing v. John L. Scott, Inc., 134 Wn.2d 24, 30, 948 P.2d 816 (1997); Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 785, 719 P.2d 531 (1986). Similarly, a communication may contain accurate information and still be unfair or deceptive, if there is a representation, omission, or practice that is likely to mislead a reasonable consumer. In this way, a defendant's use of accurate information may fall within the CPA as being deceptive or unfair. Panag, 166 Wn.2d at 49–50; Columbia Physical Therapy, 168 Wn.2d at 442; see also Deegan v. Windermere Real Est./Center-Isle Inc., 197 Wn.App. 875, 890, 391 P.3d 532 (2017) (even accurate information may be deceptive if there is a representation, omission or practice that is likely to mislead).

Unfair acts or practices. Although most consumer cases under the CPA focus on "deceptive" acts or practices, RCW 19.86.020 also prohibits acts or practices that are "unfair." The statute does not define "unfair," and Washington law has not yet defined the term. The WPI Committee sets out the following discussion to assist practitioners in developing their own instructional language in consumer cases.

In Klem v. Washington Mutual Bank, 176 Wn.2d 771, 295 P.3d 1179 (2013), the Supreme Court held that "an act or practice can be unfair

without being deceptive." Klem, 176 Wn.2d at 787. The court held that the "or" between "unfair" and "deceptive" in RCW 19.86.020 is "disjunctive," and consequently, that unfair acts or practices alone may satisfy the unfair or deceptive requirement. Klem, 176 Wn.2d at 787. The court did not define an "unfair" act or practice, however, noting:

> " 'It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin all over again.' "

Klem, 176 Wn.2d. at 786 (citations omitted).

The unfair practice in *Klem* that the court held sufficient to meet the "unfair" prong was a foreclosure trustee's practice of deferring to the lender on whether to postpone a foreclosure sale, and failing to exercise the independence required of an impartial trustee. Klem, 176 Wn.2d at 792.

The court in *Klem* offered some guidance on how unfair acts under the CPA might be analyzed. After observing that the CPA is modeled on the Federal Trade Commission (FTC) Act and was intended to complement federal consumer protection law, the court in *Klem* stated that Washington courts may be guided by federal laws in this area, citing RCW 19.86.920. The court suggested that FTC law may be persuasive as a starting point for defining "unfair" acts or practices under the CPA. Klem, 176 Wn.2d at 787–88. The court noted that under current FTC law a practice is "unfair" if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits." Klem, 176 Wn.2d at 787–88. (quoting 15 U.S.C.A. § 45(n)); see also Mellon v. Regional Trustee Servs. Corp., 182 Wn.App. 476, 487–491, 334 P.3d 1120 (2014).

The court in *Klem* also cited with approval Magney v. Lincoln Mutual Savings Bank, 34 Wn.App. 45, 57, 659 P.2d 537 (1983), which held that an act is unfair under the CPA if it offends public policy as established "by statutes [or] the common law," or is "unethical, oppressive, or unscrupulous," among other things. Klem, 176 Wn.2d at 786 (citing *Magney*); see also Mellon, 182 Wn.App. at 490.

The *Mellon* court also stated that "advancing a substantively or procedurally unconscionable contract term is likely an 'unfair' act or practice." Mellon, 182 Wn.App. at 490 (citing State v. Kaiser, 161 Wn.App. at 705, 722, 254 P.3d 850 (2011), and State v. Ralph Williams' NW Chrysler Plymouth, Inc., 87 Wn.2d 298, 309, 553 P.2d 423 (1976)).

Based on these definitions of "unfairness," the court held that the loan servicer's alleged conduct, if proven, was "unfair" and would justify relief under the CPA. Mellon, 182 Wn.App. at 491; see also Blake v. Federal Way Cycle Ctr., 40 Wn.App. 302, 310–11, 698 P.2d 578 (1985) (citing FTC v. Sperry & Hutchison Co., 405 U.S. 233, 244 n.5, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972)) (discussing "unfairness" standard under CPA in light of FTC standards).

Statutory violations. When the defendant's act or practice is alleged to be "unfair or deceptive" because of a statutory violation, see WPI 310.03 (*Per Se* Violation of Consumer Protection Act).

[Current as of February 2021.]

WPI 310.09

DEFINITION—TRADE OR COMMERCE

The phrase "trade or commerce" includes the sale of assets or services, and any commerce directly or indirectly affecting the people of the State of Washington. The word "assets" includes anything of value.

NOTE ON USE

Use this instruction with WPI 310.01 (Elements of a Violation of the Consumer Protection Act) only when "trade or commerce" is at issue.

COMMENT

RCW 19.86.010; see also Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 785, 719 P.2d 531 (1986). If there is no material dispute of fact regarding the "trade or commerce" element, the parties should stipulate that the element is met or the judge should so rule, and this instruction should not be given.

Professional business services. In Michael v. Mosquera-Lacey, 165 Wn.2d 595, 602–03, 200 P.3d 695 (2009), the Washington Supreme Court held that the Consumer Protection Act applies to only the entrepreneurial activities that are part of professional service business (e.g., medical, legal, and dental practices). Examples of the "trade or commerce" part of a professional business include price-setting, marketing, and billing activities. Michael, 165 Wn.2d at 602–03; see also Ramos v. Arnold, 141 Wn.App. 11, 20, 169 P.3d 482 (2007).

Contrasted with entrepreneurial activities are the activities involved in providing the substantive professional services of the business practice, which are not covered under the CPA. For example, the CPA does not cover "a doctor's skills in examining, diagnosing, treating, or caring for a patient." Michael, 165 Wn.2d at 602–03 (citing Wright v. Jeckle, 104 Wn.App. 478, 16 P.3d 1268 (2001)).

It may not always be easy to distinguish professional and entrepreneurial services. For example, in *Wright*, the Court of Appeals held that a doctor who prescribes the weight-loss drug fen-phen to his patients can be engaged in entrepreneurial activity depending on the extent to which the doctor advertises, markets, and sells the drug. Wright, 104 Wn.App. at 484–85 (a doctor who is in the business of selling diet drugs would be subject to the CPA, whereas a doctor who is practicing

medicine would not); see also Young v. Savidge, 155 Wn.App. 806, 825–27, 230 P.3d 222 (2010) (factual question whether dentist demonstrated entrepreneurial motive by withholding information about using nickel in crowns when advertisement indicated gold, porcelain, or stainless steel).

Publishers. Publishing information does not necessarily constitute advertising in the course of trade or commerce. For example, the court in Fidelity Mortgage Corp. v. Seattle Times Co., 131 Wn.App. 462, 128 P.3d 621 (2005), held that the Seattle Times did not "advertise" when it published quarterly charts showing interest rates for mortgages. Because it was not an advertisement, this activity did not constitute "trade or commerce."

[Current as of February 2021.]

PART XVI

EMPLOYMENT

CHAPTER 330

EMPLOYMENT DISCRIMINATION

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WPI 330.01.02	Employment Discrimination—Disparate Treatment—Adverse Employment Action—Definition
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WPI 330.04	Employment Discrimination—Bona Fide Occupational Qualification (BFOQ) Defense
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	Discrimination—Reasonable Accommodation—Burden of Proof
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WPI 330.44	Employment Discrimination—Pregnancy Discrimination—Definition
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WPI 330.52	Employment Discrimination—Constructive Discharge—Burden of Proof
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WPI 330.81.02	Employment Discrimination—Damages—After-Acquired Evidence
WPI 330.82	Employment Discrimination—Damages—Future Lost Earnings (Front Pay)

WPI 330.83 Employment Discrimination—Damages—Mitigation—Wage Loss
WPI 330.90 Employment Discrimination—Employee Versus Independent Contractor (Minimum Wage Act)
WPI 330.91 Employment Discrimination—Joint Employer Status (Minimum Wage Act)

WPI 330.00

EMPLOYMENT DISCRIMINATION—INTRODUCTION

Statutory discrimination claims. State law discrimination claims usually arise under RCW Chapter 49.60, which prohibits discrimination on the basis of creed, color, disability, marital status, national origin, race, religion, gender, HIV infection, use of a trained guide or service dog, and military status, as well as retaliation for opposing discriminatory practices. Other state statutes supplement RCW Chapter 49.60. See, e.g., RCW 49.44.090 (implying right of action for age discrimination) and RCW 49.58.020 (expressing right of action for gender discrimination in pay for "comparable work"); but see Marquis v. City of Spokane, 130 Wn.2d 97, 112–15, 922 P.2d 43 (1996) (allowing independent contractor to bring a discrimination claim under the Washington Law Against Discrimination (WLAD)).

State law wage and hour claims may arise under RCW Chapter 49.46, the Minimum Wage Act. RCW Chapter 49.46 definitions and standards are now included in these pattern instructions, including instructions on joint employers and employee/independent contractor classifications. WPI 330.90 (Employment Discrimination—Employee Versus Independent Contractor (Minimum Wage Act)); WPI 330.91 (Employment Discrimination—Joint Employer Status (Minimum Wage Act)). These instructions may not apply to claims arising under other statutes or common law.

These instructions relate only to causes of action arising under RCW Chapter 49.60, RCW Chapter 49.44, RCW Chapter 49.46, and common law wrongful termination or constructive discharge in violation of public policy. Any causes of action based on city or county ordinances are not addressed by these instructions.

Because RCW 49.60.040(11) defines "employer" to include "any person acting in the interest of an employer, directly or indirectly," a phrase that "encompass[es] individual supervisors and managers," indi-

vidual supervisors and managers "along with their employers, may be held liable [under RCW Chapter 49.60] for their discriminatory acts." Brown v. Scott Paper Worldwide Co., 143 Wn.2d 349, 357–59, 361, 20 P.3d 921 (2001). While these instructions are phrased to cover claims against employers, they can be adapted to cover claims against multiple defendants, labor unions (see RCW 49.60.190), employment agencies (see RCW 49.60.200), and anyone who "aid[s], abet[s], encourage[s], or incite[s]" discrimination (see RCW 49.60.220). An "aiding and abetting" instruction is not provided in these pattern instructions, as aiding and abetting cases have not arisen with sufficient frequency to generate significant appellate court discussion of the subject.

Interaction with federal law. Washington cases recognize federal authority as a helpful guide in construing RCW Chapter 49.60, but only when it "best further[s] the purposes and mandates of our state statute." Blackburn v. State, 186 Wn.2d 250, 258, 375 P.3d 1076 (2016). However, federal law interpretations are inapplicable when the language of the state statute differs significantly from that in the corresponding federal statute. Brown, 143 Wn.2d at 358; Martini v. Boeing Co., 137 Wn.2d 357, 372–77, 971 P.2d 45 (1999) (federal law not helpful when the statutory language differs significantly).

RCW Chapter 49.60's liberal construction mandate makes it broader in scope than Title VII. Martini, 137 Wn.2d at 372–73 (citing RCW 49. 60.020). When the Washington Supreme Court interpretationsof the WLAD differ from those of federal statutes, "it has almost always ruled that the WLAD provides greater employee protections than its federal counterparts do." Kumar v. Gate Gourmet Inc., 180 Wn.2d 481, 491, 325 P.3d 193 (2014); see, e.g., Brownfield v. City of Yakima, 178 Wn.App. 850, 872, 316 P.3d 520 (2014) (while ADA requires "but for" causation, WLAD disability claims use a less stringent "substantial factor" test).

Also, federal law discrimination claims may be joined with claims brought under RCW Chapter 49.60 because some federal discrimination claims may be brought in state court. See, e.g., Yellow Freight Sys., Inc., v. Donnelly, 494 U.S. 820, 821, 110 S.Ct. 1566, 108 L.Ed.2d 834 (1990) (holding that state courts have concurrent authority to adjudicate Title VII claims); DeHorney v. Bank of Am. Nat'l Trust and Sav. Ass'n, 879 F.2d 459, 463 (9th Cir. 1989) (holding that state courts have concurrent authority to adjudicate section 1981 claims); Hiatt v. Walker Chevrolet Co., 120 Wn.2d 57, 64, 837 P.2d 618 (1992) (Title VII); Sambasivan v. Kadlec Med. Ctr., 184 Wn.App. 567, 570, 578, 338 P.3d 860 (2014) (§ 1981 and WLAD claims); Miguel v. Guess, 112 Wn.App. 536, 541, 51 P.3d 89 (2002) (§ 1983 claim against public employer).

Major sources of federal anti-discrimination law include:

- Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., which prohibits discrimination on the basis of race, color, religion, gender, pregnancy, and national origin, see WPI Part XVII, Civil Rights, including WPI 340.00 (Civil Rights—Introduction);

- the Americans with Disabilities Act, 29 U.S.C. §§ 12101 et seq., and the Rehabilitation Act, 29 U.S.C. §§ 791 et seq., which prohibit discrimination on the basis of disability;

- the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq., which prohibits discrimination on the basis of age;

- the Equal Pay Act, 29 U.S.C. § 206(d)(1), which prohibits discrimination in pay on the basis of sex; and

- 42 U.S.C. § 1981, which prohibits discrimination on the basis of race, ancestry, ethnicity (see St. Francis College v. Al-Khazraji, 481 U.S. 604, 614, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987)), and in some instances religion (see Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617–18,107 S.Ct. 2019, 95 L.Ed.2d 594 (1987)).

These statutes also prohibit retaliation.

A number of federal circuits, including the Ninth Circuit, have model jury instructions on certain employment discrimination claims arising under federal statutes. When federal issues exist, or when state law is silent on an issue that has been addressed in federal statutes or cases, these model instructions may provide some assistance.

Disparate treatment claims. Disparate treatment instructions are set forth in WPI 330.01 (Employment Discrimination—General—Disparate Treatment—Burden of Proof) and WPI 330.32 (Employment Discrimination—Disability Discrimination—Disparate Treatment—Burden of Proof). Disparate treatment, which "is the most easily understood type of discrimination," occurs when "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, . . . national origin" or other prohibited characteristic. Blackburn, 186 Wn.2d at 258. "When an employee makes out a claim of disparate treatment under the WLAD, like Title VII, the employer's action is unlawful unless the employer has a valid justification . . ." such as affirmative action or a bona fide occupational qualification. Blackburn, 186 Wn.2d at 258–59.

In 2014, the Washington Supreme Court recognized a claim for fail-

ure to make a religious accommodation. Kumar, 180 Wn.2d 481. In E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 774–75, 135 S.Ct. 2028, 192 L.Ed.2d 35 (2015), the U.S. Supreme Court held that a disparate treatment claim based on religion arises under Title VII when the employer makes the employee's religious practice an issue in an employment decision.

Bona fide occupational qualification defense. Sometimes, an employer may justify an otherwise discriminatory decision by asserting a bona fide occupational qualification ("BFOQ") defense. RCW 49.60.180 (1); Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 357–58, 172 P.3d 688 (2007). WPI 330.04 (Employment Discrimination—Bona Fide Occupational Qualification (BFOQ) Defense) applies to the BFOQ defense in refusal to hire or wrongful discharge situations. Kries v. WA-SPOK Primary Care, LLC, 190 Wn.App. 98, 128, 362 P.2d 974 (2015).

Disparate impact claims. Disparate impact analysis bars "facially neutral employment policies that have disproportionate adverse effects on a protected class." Kumar, 180 Wn.2d at 499. "To establish a prima facie case of disparate impact, the plaintiff must show that (1) a facially neutral employment practice (2) falls more harshly on a protected class." Kumar, 180 Wn.2d at 503. See WPI 330.02 (Employment Discrimination—Disparate Impact—Definition).

Workplace harassment claims. Sexual harassment cases generally fall into two types of claims: "the quid pro quo sexual harassment claim, where the employer requires sexual consideration from the employee for job benefits, and the hostile work environment claim." Antonius v. King Cnty., 153 Wn.2d 256, 261, 103 P.3d 729 (2004). RCW Chapter 49.60 also allows hostile work environment claims based on other protected characteristics. Robel v. Roundup Corp., 148 Wn.2d 35, 48, 59 P.3d 611 (2002) (allowing disability-based hostile work environment claim); Davis v. W. One Auto. Grp., 140 Wn.App. 449, 457, 166 P.3d 807 (2007) (race-based hostile work environment claim); Fisher v. Tacoma Sch. Dist. No. 10, 53 Wn.App. 591, 595–96, 769 P.2d 318 (1989) (allowing race-based hostile work environment claim).

The two basic types of workplace protected category harassment claims are covered in WPI 330.21 (Employment Discrimination—Workplace Harassment—General), together with WPI 330.22 (Employment Discrimination—Sexual Harassment—Quid Pro Quo—Burden of Proof) or WPI 330.23 (Employment Discrimination—Workplace Harassment—Hostile Work Environment—Burden of Proof). See Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 405, 693 P.2d 708 (1985). These instructions can be adapted for use in retaliation cases, when the retaliation takes the form of work place harassment, or for use in harass-

ment based on other prohibited characteristics, such as race. See the Comment to WPI 330.23 (Employment Discrimination—Workplace Harassment—Hostile Work Environment—Burden of Proof).

Disability claims.A disabled employee may have a cause of action for at least two different types of discrimination: (1) disparate treatment because of the employee's disability, and (2) failure to accommodate when the employer failed to reasonably accommodate the employee's disability. Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 144–45, 94 P.3d 930 (2004) (citing RCW 49.60.180).

The Legislature substantially amended RCW Chapter 49.60 in 2007 by defining "disability," a term previously undefined in the statute. See RCW 49.60.040(7). This amendment expanded the definition in response to the decision in McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006), in which the Supreme Court determined that the definition of "disability" found in the Americans with Disabilities Act, 42 U.S.C. § 12101, applied in actions brought under RCW Chapter 49.60. See Hale v. Wellpinit Sch. Dist. No. 49, 165 Wn.2d 494, 502, 198 P.3d 1021 (2009). The instructions at WPI 330.31 (Employment Discrimination—Disability Discrimination—Definition of Disability), WPI 330.31.01 (Employment Discrimination—Disability Discrimination—Definition of Impairment), and WPI 330.33 (Employment Discrimination—Disability Discrimination—Reasonable Accommodation—Burden of Proof) incorporate the legislative definition, which is considerably broader than the definition previously adopted in *McClarty* and the federal law definition. The current legislative definition applies to all causes of action occurring before July 6, 2006, and on or after July 21, 2007. Hale, 165 Wn.2d at 502; RCW 49.60.040.

Claims of failure to reasonably accommodate a disability are covered by WPI 330.33 (Employment Discrimination—Disability Discrimination—Reasonable Accommodation—Burden of Proof) and WPI 330.34 (Employment Discrimination—Disability Discrimination—Reasonable Accommodation—Definition). Such claims arise from the recognition that "*different* treatment may eliminate discrimination against the [disabled] and open the door to employment opportunities." Holland v. Boeing Co., 90 Wn.2d 384, 388, 583 P.2d 621 (1978) (emphasis in original). An employer must "reasonably accommodate a disabled employee unless the accommodation would be an undue hardship on the employer." Riehl, 152 Wn.2d at 145. An employer's duty to accommodate does not require it to alter the "essential functions" of the job, properly understood as the "fundamental job duties" or "indispensable" tasks of the position. Davis v. Microsoft Corp., 149 Wn.2d 521, 534–35, 70 P.3d 126 (2003).

Retaliation. It is unlawful for an employer to retaliate against a

person for (1) opposing what the person reasonably believed to be discrimination in violation of RCW Chapter 49.60 or (2) providing information to or participating in a proceeding to determine whether discrimination or retaliation occurred. See WPI 330.05 (Employment Discrimination—Retaliation). One of the elements of a retaliation claim is an adverse employment action. See WPI 330.06 (Employment Discrimination—Retaliation—Adverse Employment Action—Definition). The definition of an adverse employment action is different for retaliation claims than for claims of disparate treatment. Compare WPI 330.04 (Employment Discrimination—Bona Fide Occupational Qualification (BFOQ) Defense) with WPI 330.01.02 (Employment Discrimination—Disparate Treatment—Adverse Employment Action—Definition). For claims involving retaliation for refusal to hire an applicant in retaliation for prior opposition to discrimination against a different employer, see Jin Zhu v. N. Cent. Educ. Serv. Dist. - ESD 171, 189 Wn.2d 607, 404 P.3d 505 (2017).

Employee versus independent contractor classification. Depending on the cause of action, a plaintiff's ability to bring a successful claim may turn on whether the law classifies the plaintiff as an "employee" or an "independent contractor." See Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 871, 281 P.3d 289 (2012) (discussing definition of "employee" for Minimum Wage Act claim); Sambasivan, 184 Wn.App. at 590–92 (allowing independent contractor to bringWLAD retaliation claim); Ebling v. Gove's Cove, Inc., 34 Wn.App. 495, 497–98, 663 P.2d 132 (1983) (discussing definition of "employee" for Wage Rebate Act claim). For Minimum Wage Act claims when there is a question about the plaintiff's employee or independent contractor status, WPI 330.90 (Employment Discrimination—Employee Versus Independent Contractor (Minimum Wage Act)) should be used.

Damages. The most common elements of compensatory damages in cases brought under RCW Chapter 49.60, including damages for future lost wages, are covered in WPI 330.81 (Employment Discrimination—Damages—Economic and Non-Economic—No After-Acquired Evidence) and WPI 330.82 (Employment Discrimination—Damages—Future Lost Earnings (Front Pay)). A third instruction, WPI 330.83 (Employment Discrimination—Damages—Mitigation—Wage Loss), addresses the issue of failure to mitigate in an employment discrimination case when the failure is related to efforts to pursue other employment opportunities.

The instructions now incorporate the after-acquired evidence doctrine, which can reduce a plaintiff's lost wage damages when the employer discovers misconduct by the employee. WPI 330.81.01 (Employment Discrimination—Damages—Economic and Non-

Economic—After-Acquired Evidence); WPI 330.81.02 (Employment Discrimination—Damages—After-Acquired Evidence). An employer can reduce back pay damages and preclude front pay damages by demonstrating it would have terminated the employee if it had known of the employee's misconduct at the time. Lodis v. Corbis Holdings, Inc., 192 Wn.App. 30, 60, 366 P.3d 1246 (2015).

Common law claims. Increasingly, employment law claims are going to trial based on common law theories. See, e.g., Robel, 148 Wn.2d at 51 (outrage claim arising out of work place harassment); Roberts v. Dudley, 140 Wn.2d 58, 71, 993 P.2d 901 (2000) (wrongful discharge in violation of public policy); Bennett v. Hardy, 113 Wn.2d 912, 919, 784 P.2d 1258 (1990) (discharge in violation of public policy). But see Haubry v. Snow, 106 Wn.App. 666, 678, 31 P.3d 1186 (2001) (no negligent infliction of emotional distress claim based on same facts as discrimination claim).

In 2015, the Washington Supreme Court revived the wrongful termination in violation of public policy tort by overruling the requirement that a plaintiff establish inadequacy of alternative remedies. Rose v. Anderson Hay & Grain Co., 184 Wn.2d 268, 286, 358 P.3d 1139 (2015); Becker v. Cmty. Health Sys., Inc., 184 Wn.2d 252, 258, 359 P.3d 746 (2015); Rickman v. Premera Blue Cross, 184 Wn.2d 300, 309–10, 358 P.3d 1153 (2015). The court reaffirmed the approach it had established in Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 685 P.2d 1081 (1984), and Gardner v. Loomis Armored Inc., 128 Wn.2d 931, 913 P.2d 377 (1996).

The *Rose* court stated that a plaintiff will satisfy his or her burden and establish liability under one of the four common scenarios: (1) when employees are fired for refusing to commit an illegal act, (2) when employees are fired for performing a public duty or obligation, such as serving jury duty, (3) when employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims, and (4) when employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing. Rose, 184 Wn.2d at 286–87.

The *Rose* court also noted that while the *Thompson* analysis will suffice in most cases, a more "refined analysis" might be necessary when the facts do not fit neatly into one of the four scenarios. In those cases, a court will analyze a claim for wrongful discharge in violation of public policy under a *Gardner* analysis, by examining:

> (1) the existence of a "clear public policy" (clarity element), (2) whether "discouraging the conduct in which [the employee] engaged would jeopardize the public policy" (jeopardy element), (3) whether

> the "public-policy-linked conduct caused the dismissal" (causation element), and (4) whether the employer is "able to offer an overriding justification for the dismissal" (absence of justification element).

Rose, 184 Wn.2d at 277 (quoting Gardner, 128 Wn.2d at 941).

Wrongful termination and constructive discharge in violation of public policy are now covered in WPI 330.50 (Employment Discrimination—Wrongful Termination in Violation of Public Policy), WPI 330.51 (Employment Discrimination—Wrongful Termination by Employer in Violation of Public Policy—Burden of Proof), and WPI 330.52 (Employment Discrimination—Constructive Discharge—Burden of Proof).

Public Accommodation Claims. For a discrimination or harassment claim against an employer brought by a member of the public based upon acts or conduct of that employer's agent or employee, see Floeting v. Grp. Health Coop., 192 Wn.2d 848, 434 P.3d 39 (2019); W.H. v. Olympia Sch. Dist., 195 Wn.2d 779, 465 P.3d 322 (2020); WPI 330.45 (Employment Discrimination—Pregnancy Discrimination—Reasonable Accommodation—Burden of Proof).

[Current as of October 2020.]

WPI 330.01

EMPLOYMENT DISCRIMINATION—GENERAL—DISPARATE TREATMENT—BURDEN OF PROOF

Discrimination in employment on the basis of [age] [creed] [marital status] [national origin] [citizenship or immigration status] [race] [religion] [gender] [sexual orientation] [honorably discharged veteran status] [military status] is prohibited.

To establish [his] [her] "disparate treatment claim," (name of plaintiff) has the burden of proving each of the following propositions:

(1) That (name of defendant) took an adverse employment action against (name of plaintiff); and

(2) That (name of plaintiff)'s [age] [creed] [marital status] [national origin] [citizenship or immigration status] [race] [religion] [gender] [sexual orientation] [honorably discharged veteran status] [military status] was a substantial factor in (name of defendant)'s decision to take the adverse action.

If you find from your consideration of all the evidence that both of these propositions have been proved, your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if either of the propositions has not been proved, your verdict should be for (name of defendant) [on this claim].

NOTE ON USE

This instruction is not intended for use in Disability Discrimination cases. Instead, use WPI 330.31–.37, as appropriate to the case.

Use WPI 330.01.02 (Employment Discrimination—Disparate Treatment—Adverse Employment Action—Definition) if there is a factual issue whether the employer's action is an adverse employment action.

Select the bracketed words or phrases as appropriate.

This instruction is intended for use in a disparate treatment case involving a discrete adverse employment action, such as a discharge, demotion, a change in benefits or compensation, a layoff, or a failure to hire or promote. The parties will usually set out their competing views on the employer's motivation in a summary of claims instruction. This instruction simply describes the ultimate issue to be decided by the jury.

For a disparate impact claim, rather than a disparate treatment claim, use WPI 330.03 (Employment Discrimination—Disparate Impact—Business Necessity—Burden of Proof) with WPI 330.02 (Employment Discrimination—Disparate Impact—Definition) instead of this instruction.

For workplace harassment cases, use this instruction with WPI 330.21 (Employment Discrimination—Workplace Harassment—General) and, depending on the theory of the case, WPI 330.22 (Employment Discrimination—Sexual Harassment—Quid Pro Quo—Burden of Proof) or WPI 330.23 (Employment Discrimination—Workplace Harassment—Hostile Work Environment—Burden of Proof).

When necessary to avoid confusion, "sex" may be substituted for "gender" in gender discrimination cases. Washington's law against discrimination specifically provides that "sex" and "gender" are interchangeable. RCW 49.60.040(25).

For a discussion of honorably discharged veteran status and military status, see the Comment.

In a retaliation case, use WPI 330.05 (Employment Discrimination—Discrimination—Retaliation).

This instruction should be used with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

Agency may be an issue in cases challenging discrete employment decisions. WPI 50.18 (Corporation Acts Through its Employees—No Issue as to Scope of Agency) may be used in such cases. When a plaintiff has made a claim against a supervisor or manager who personally participated in the challenged employment decisions(s) and/or act(s), this instruction may need to be modified. See the discussion in the Comment.

COMMENT

This instruction has been modified for this edition to add "citizen or immigration status" and move "disability" to WPI 330.31–.37.

Washington's law against discrimination provides that it is an "unfair practice" to:

> discharge or bar any person from employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, citizenship or immigration status, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a traineddog guide or service animal by a person with a disability.

Citizenship or immigration status. The Legislature added "citizenship or immigration status" to Washington's Law Against Discrimination, effective June 11, 2020. This instruction was revised in 2020 to reflect this statutory change. The statutory amendments further specify that "to the extent that distinction or differential treatment on the basis of citizenship or immigration status is authorized by federal or state law, regulation, or government contract, it is not an unfair practice." RCW 49.60.020. If there is a dispute as to whether the differential treatment based on citizenship or immigration status is authorized by federal or state law, regulation, or government contract, the parties may need to modify this instruction to include this qualification.

Although the Legislature added as new protected classes both "citizenship" and "immigration status," whether to include just one or both classes should be determined by the facts at issue.

Age. RCW 49.60.180(2). With the exception of age bias, which is separately prohibited for people 40 years or older, discrimination against these protected groups is also prohibited by RCW 49.60.030, a statutory declaration of civil rights. Age bias is addressed at RCW 49.44.090.

Pregnancy. In Washington, discrimination on the basis of pregnancy is a form of gender discrimination and, therefore, unlawful. See, e.g., WAC 162-30-020; WAC 162-12-140(3)(n); Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 172 P.3d 688 (2007); Kuest v. Regent Assisted Living, Inc., 111 Wn.App. 36, 43 P.3d 23 (2002).

Sexual orientation. The term "sexual orientation" is defined in RCW 49.60.040(26). The statutory definition includes ". . . heterosexuality, homosexuality, bisexuality, and gender expression or identity." The term "disability" is defined and codified in RCW 49.60.040(7), as amended in 2007.

Veteran or military status. The term "honorably discharged veteran or military status" is defined in RCW 49.60.040(15) as referring to a person who is:

(a) A veteran, as defined in RCW 41.04.007; or

(b) An active or reserve member in any branch of the armed forces of the United States, including the national guard, coast guard, and armed forces reserves.

Under RCW 41.04.007, a veteran is a person who has received an honorable discharge, or received a discharge for medical reasons with an honorable record, or is in receipt of a United States department of defense discharge document DD form 214, NGB form 22, or their equivalent or successor discharge paperwork, that characterizes his or her service as honorable, after having served in certain designated capacities. In a particular case, some of this statutory terminology may need to be incorporated into the jury instructions.

Burden of proof—"substantial factor." The plaintiff must ultimately prove that the prohibited factor was a "substantial factor" in an employer's adverse employment action. Scrivener v. Clark College, 181 Wn.2d 439, 444, 334 P.3d 541 (2014) (the "substantial factor" test, rather than a "determining factor" test, is the appropriate standard for determining whether an employer's adverse employment decision was "because of" one of the prohibited factors enumerated in RCW 49.60. 180(2) (citing Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 310, 898 P.2d 284 (1995))).

In some cases, it may be appropriate to instruct the jury on a "cat's paw," or subordinate bias, theory regarding proximate cause. Boyd v. State, 187 Wn.App.1, 19–20, 349 P.3d 864 (2015) (approving the instruction, "if a supervisor performs an act motivated by retaliatory animus that is intended by the supervisor to cause an adverse employment action, and if that act is relied on by the employer and is a substantial factor in the ultimate employment action, then the employer is liable for retaliation").

Motion practice often deals with shifting productions of evidence and whether a party has met the requisites of a prima facie case. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–804, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 180–81, 23 P.3d 440 (2001); see also, Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cnty., 189 Wn.2d 516, 526–27, 404 P.3d 464 (2017) ("Because intentional discrimination is difficult to prove, we have adopted the evidentiary burden-shifting scheme announced in McDonnell Douglas."); Mackey v. Home Depot USA, Inc., 12 Wn.App.2d 557, 571, 459 P.3d 371 (2020).

The jury should not be instructed on burden shifting. See, e.g., Kastanis v. Educ. Emps. Credit Union, 122 Wn.2d 483, 490, 859 P.2d 26 (1993), as amended, 122 Wn. 2d 483, 865 P.2d 507 (1994) (shifting burden rules were never intended as a charge to the jury); Burnside v. Simpson Paper Co., 66 Wn.App. 510, 523, 832 P.2d 537 (1992) (burden of proof formulation was not intended as a prospective jury charge), affirmed, 123 Wn.2d 93, 864 P.2d 937 (1994).

For much the same reason, an instruction or language on pretext is unnecessary. Kastanis, 122 Wn.2d at 495 ("a separate instruction on pretext is unnecessary"). However, Farah v. Hertz Transporting, Inc., 196 Wn.App. 171, 181, 383 P.3d 552 (2016), held that while a pretext instruction "might be appropriate" in cases addressing permissible inferences of discrimination, such an instruction is not required.

Other considerations. Damages are not always an element of the claim, so they are not included as such in this instruction. Under Davis v. Department of Labor and Industries, 94 Wn.2d 119, 615 P.2d 1279 (1980), for example, one might be entitled to a favorable ruling on liability even absent a showing of damages. Beyond this, "[i]f no actual damage is shown [in an RCW Chapter 49.60 case], nominal damages will be presumed." Lewis v. Doll, 53 Wn.App. 203, 212, 765 P.2d 1341 (1989); see also Browning v. Slenderella Sys. of Seattle, 54 Wn.2d 440, 341 P.2d 859 (1959) (RCW 9.91.010 case).

As indicated in the Note on Use, the pattern instruction was drafted to apply to cases involving an employer's discrete decision to discharge, lay off, not hire, not to promote an employee, or other tangible adverse action. See RCW 49.60.180(2). In addition to these decisions, the statute separately prohibits employers from "discriminat[ing] against any person in compensation or in other terms or conditions of employment" on the basis of the same protected categories. RCW 49.60.180(3). For cases falling under these latter prohibitions, the instruction may need to be modified.

In some cases, jurors may need to be instructed about principles of agency. In Brown v. Scott Paper Worldwide Co., 143 Wn.2d 349, 20 P.3d 921 (2001), the court held that individual supervisors, as well as their employers, may be held liable for discriminatory acts.

[Current as of November 2020.]

WPI 330.01.01

EMPLOYMENT DISCRIMINATION—GENERAL—DISPARATE TREATMENT—BURDEN OF PROOF—SUBSTANTIAL FACTOR

"Substantial factor" means a significant motivating factor in bringing about the employer's decision. "Substantial factor" does not mean the only factor or the main factor in the challenged act or decision. ["Substantial factor" also does not mean that (name of plaintiff) would have been [promoted] [hired] [not terminated] [not laid off] but for [his] [her] [age] [creed] [marital status] [national origin] [race] [citizenship or immigration status] [religion] [gender] [sexual orientation] [honorably discharged veteran status] [military status].]

NOTE ON USE

Use this instruction with WPI 330.01 (Employment Discrimination—General—Disparate Treatment—Burden of Proof) to define the term "substantial factor."

The bracketed final sentence distinguishes the "substantial factor" analysis of causation from the traditional "but for" analysis. The sentence should be used only in cases that have some claims that are subject to the "substantial factor" analysis and other claims that are subject to the "but for" analysis.

COMMENT

This instruction has been modified for this edition to add "citizen or immigration status" and move "disability" to WPI 330.31–.37.

The Legislature added "citizenship or immigration status" to Washington's Law Against Discrimination effective June 11, 2020. This instruction was revised in 2020 to reflect this statutory change.

The Supreme Court approved the definition of "substantial factor" in Scrivener v. Clark College, 181 Wn.2d 439, 444, 334 P.3d 541 (2014) (citing Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 310, 898 P.2d 284 (1995)). See also Currier v. Northland Servs., Inc., 182 Wn.App. 733, 746–47, 332 P.3d 1006 (2014).

[Current as of November 2020.]

WPI 330.01.02

EMPLOYMENT DISCRIMINATION—DISPARATE TREATMENT—ADVERSE EMPLOYMENT ACTION—DEFINITION

An adverse employment action is one that materially affects the terms, conditions or privileges of employment.

NOTE ON USE

Use with WPI 330.01 (Employment Discrimination—General—Disparate Treatment—Burden of Proof) when there is an issue of fact whether the employer's action was significant enough to constitute an adverse employment action.

If both disparate treatment and retaliation are involved, combine the instruction with WPI 330.05 (Employment Discrimination—Retaliation) and WPI 330.06 (Employment Discrimination—Retaliation—Adverse Employment Action—Definition) to differentiate adverse employment action in disparate treatment claims from adverse employment action in retaliation claims as there are separate definitions for each.

COMMENT

An adverse employment action has long been understood to include a firing or demotion, and a failure to hire or promote. Davis v. Dep't of Labor & Indus., 94 Wn.2d 119, 615 P.2d 1279 (1980). There will generally be no dispute in such cases. A hostile work environment may amount to an adverse employment action. Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.3d 611 (2002) (verbal and non-verbal harassment based on disability); Harrell v. Dep't of Soc. & Health Servs., 170 Wn.App. 386, 398, 285 P.3d 159 (2012). A broad array of other actions may either singularly or taken together constitute an adverse action, including reassignment with significantly different responsibilities, a decision causing a significant change in benefits, or a poor performance rating preventing rehiring. Boyd v. State, 187 Wn.App.1, 11–12, 349 P.3d 864 (2015); Marin v. King Cnty., 194 Wn.App. 795, 808, 378 P.3d 203 (2016); Cornwell v. Microsoft Corp., 192 Wn.2d 403, 430 P.3d 229 (2018).

An action must involve a change in employment that is more than an inconvenience or alteration of one's job responsibilities. Boyd, 187 Wn.App. at 11–12; Kirby v. City of Tacoma, 124 Wn.App. 454, 98 P.3d 827 (2004). However, the distinction between an adverse employment

action and a mere "inconvenience" or "alterations of one's job responsibilities" is not a bright line. See Alonso v. Qwest Commc'ns Co., LLC, 178 Wn.App. 734, 747, 315 P.3d 610 (2013) (whether loss of certain van and cellular phone benefits constituted adverse employment action an issue of fact for the jury); Davis v. W. One Auto Grp., 140 Wn.App. 449, 166 P.3d 807 (2007) (failure to give plaintiff same recognition as employee of the month, such as posting his picture or letting him drive the car of his choice, was sufficient to state a claim).

Illustrating the fact-specific nature of the inquiry is Blackburn v. Department of Social & Health Services, 186 Wn.2d 250, 375 P.3d 1076 (2016), which involved a decision not to schedule African-American staff on a single weekend because of a Western State Hospital resident's violent racist conduct. Reversing the trial court, the Washington Supreme Court held that the employer's staffing decision for a single weekend constituted disparate treatment "in the terms and conditions of employment." However, the Supreme Court affirmed the holding that the single weekend decision was not severe and pervasive enough to constitute a hostile environment, therefore affirming the dismissal of that claim.

[Current as of October 2020.]

WPI 330.02

EMPLOYMENT DISCRIMINATION—DISPARATE IMPACT—DEFINITION

It is unlawful for an employer to [engage in a practice] [apply a preference] [impose a requirement] [use an overall selection process] [(other adverse action)] that has a disparate impact on [(describe protected status)] [, unless it is justified by business necessity].

A [practice] [preference] [requirement] [overall selection process] [(other adverse action)] has a "disparate impact" if it is apparently neutral in its treatment of individuals regardless of [(describe protected status)], but in fact falls more harshly on [(describe group disparately impacted)].

NOTE ON USE

Select or insert words or phrases and protected status as appropriate. Protected status may include but is not limited to age, creed, disability, marital status, national origin, race, religion, gender, sexual orientation, honorably discharged veteran status, military status, citizenship or immigration status, or use of a service animal by a person with a disability. RCW 49.60.020. Although the vast majority of cases are employment related, if the claim is not (i.e. against a union under RCW 49.60.190), then "employment" should not be used.

In a disparate impact case, use this instruction with WPI 330.03 (Employment Discrimination—Disparate Impact—Business Necessity—Burden of Proof). For a disparate treatment case, use WPI 330.01 (Employment Discrimination—General—Disparate Treatment—Burden of Proof), instead of these instructions.

This instruction is designed for use in a variety of discrimination/disparate impact situations. Modify the instruction to define the protected group that is adversely impacted by the employer's facially-neutral policy or activity.

COMMENT

This instruction has been modified for this edition to allow for any type of protected status to be added to the instruction. This was done for purposes of simplifying the instruction. The parties can modify this instruction to suit the particular facts of the case at issue.

This instruction was further modified for this edition to clarify that the facially neutral policy is unlawful unless justified by business necessity (rather than "adequately justified" which had been in the previous version). This change makes the instruction consistent with case law which addresses an employer's defense of business necessity. See also WPI 330.03 (Employment Discrimination—Disparate Impact—Business Necessity—Burden of Proof).

This instruction is drawn largely from Shannon v. Pay 'N Save, 104 Wn.2d 722, 709 P.2d 799 (1985). The Washington Supreme Court acknowledged the continuing viability of a disparate impact analysis in Kumar v. Gate Gourmet Inc., 180 Wn.2d 481, 503, 325 P.3d 193 (2014).

In *Shannon*, the court explained that "[u]nlike disparate treatment, the disparate impact theory enables a plaintiff to address the consequences of seemingly objective employment practices by allowing the plaintiff to prevail in an employment discrimination suit without establishing discriminatory motive." Shannon, 104 Wn.2d at 727. It "requires a plaintiff to prove: (1) a facially neutral employment practice, (2) falls more harshly on a protected class." Shannon, 104 Wn.2d at 727. The term "neutral" in this context "refers to an employment practice that contains no reference to race or other protected classes." Oliver v. Pac. Nw. Bell Telephone Co., Inc., 106 Wn.2d 675, 679 n.1, 724 P.2d 1003 (1986).

Subjective practices. The court in *Shannon* also held, citing federal authority interpreting Title VII of the Civil Rights Act of 1964, that a disparate impact theory is only to be applied to "an employment practice that includes objective treatment," i.e., that does not "turn on discretionary decisions . . . ." Shannon, 104 Wn.2d at 733; see also Oliver, 106 Wn.2d at 679–80 (relying on *Shannon*). The *Shannon* court further held that "A plaintiff is not precluded from proving a case of disparate impact simply because a portion of an employee evaluation process involves subjective judgments." Shannon, 104 Wn.2d at 732.

Religious practice claims. The Washington Law Against Discrimination (WLAD) also includes an implied requirement for employers to reasonably accommodate religious practices, thereby avoiding disparate impacts. Kumar, 180 Wn.2d at 500–01. Thus, the Washington Supreme Court has recognized a state law claim for failure to reasonably accommodate religious practices. Kumar, 180 Wn.2d at 496–501. Use WPI 330.40 (Employment Discrimination—Discrimination Based on Religion or Creed—Failure to Accommodate—Definition) for failure to reasonably accommodate religious practices claims. See also the Comment to WPI 330.03 (Employment Discrimination—Disparate Impact—Business Necessity—Burden of Proof), including employer's defense and plaintiff's rebuttal.

Claims not limited to actual or prospective employers. The Court of Appeals has held that disparate impact claims are not limited to actual or prospective employers. Howell v. Dep't of Soc. & Health Servs., 7 Wn.App.2d 899, 911, 436 P.3d 368 (2019). The plaintiff in *Howell* sued DSHS based on its rules and policies for maintaining records of "founded" filings of child abuse and neglect which had a disparate impact on the ability of Native Americans to find work. The Court of Appeals reversed the trial court's dismissal of this claim, holding that DSHS need not be plaintiff's employer to be subject to such a claim under the WLAD. Howell, 7 Wn.App.2d at 920.

[Current as of November 2020.]

WPI 330.03

EMPLOYMENT DISCRIMINATION—DISPARATE IMPACT—BUSINESS NECESSITY—BURDEN OF PROOF

To recover on [his] [her] claim of discrimination based on disparate impact, (name of plaintiff) has the burden of proving the following proposition:

(1) (Name of defendant) [engaged in a practice] [used an overall selection process] [applied a preference] [imposed a requirement] [(other adverse action)] that has a disparate impact on [(describe protected status)]. [(Name of plaintiff) can meet [his] [her] burden by showing that either an overall selection process or a given [practice] [preference] [requirement] has a disparate impact].

[On this claim,] (name of plaintiff) does not have to prove that (name of defendant) intended to discriminate or treat individuals on the basis of (describe protected category).

If (name of plaintiff) has failed to prove proposition (1), then your verdict should be for (name of defendant) [on this claim].

If (name of plaintiff) has proved proposition (1), then (name of defendant) has the burden of proving that:

(2) the [practice] [preference] [requirement] [overall selection process] [(other adverse action)] accurately predicts or significantly correlates with the fundamental requirements of the job.

If (name of plaintiff) has proved proposition (1) and (name of defendant) has failed to prove proposition (2), then your verdict should be for (name of plaintiff) [on this claim].

If (name of plaintiff) has proved proposition (1) and (name of defendant) has proved proposition (2), then (name of plaintiff) has the burden of proving that:

(3) There are other less discriminatory alternatives that equally serve (name of defendant)'s legitimate business requirements.

If (name of plaintiff) has proved proposition (1) and (name of defendant) has proved proposition (2), and (name of plaintiff) has then failed to prove proposition (3), then your verdict should be for (name of defendant) [on this claim]. If (name of plaintiff) has proved proposition (3), then your verdict should be for (name of plaintiff) [on this claim].

NOTE ON USE

Select or insert words or phrases and protected status as appropriate. Protected status may include but is not limited to age, creed, disability, marital status, national origin, race, religion, gender, sexual orientation, honorably discharged veteran status, military status, citizenship or immigration status, or use of a service animal by a person with a disability. RCW 49.60.020. Although the vast majority of cases are employment related, if the claim is not (i.e. against a union under RCW 49.60.190), then "employment" should not be used.

Use this instruction with WPI 330.02 (Employment Discrimination—Disparate Impact—Definition). See the Note on Use for WPI 330.02 (Employment Discrimination—Disparate Impact—Definition) regarding the bracketed phrases and "other adverse action."

Use the bracketed phrase "on this claim" when multiple claims are before the jury and this pattern instruction does not apply to them all.

Use WPI 330.42 (Employment Discrimination—Discrimination Based on Religion or Creed—Failure to Accommodate—Defense of Undue Hardship—Burden of Proof) for a failure to reasonably accommodate religious practices claim.

For a discussion of honorably discharged veteran status and military status, see the Comment to WPI 330.01 (Employment Discrimination—General—Disparate Treatment—Burden of Proof).

COMMENT

This instruction has been modified for this edition to allow for any

type of protected status to be added to the instruction. This was done for purposes of simplifying the instruction. The parties can modify this instruction to suit the particular facts of the case at issue.

This instruction was further modified for this edition to clarify the plaintiff's and defendant's respective burdens of proof to conform to the Supreme Court's holding in Shannon v. Pay 'N Save Corp., 104 Wn.2d 722, 731, 709 P.2d 799 (1985).

See the Comment to WPI 330.02 (Employment Discrimination—Disparate Impact—Definition).

In some cases, there may be a question of fact as to whether the plaintiff falls within one of the protected categories. This is most likely to occur in a disability case, although there may be factual issues related to other categories as well. In such cases, the burden of proof instruction will have to be modified to indicate that the plaintiff must prove that he or she is within the protected category or class. See, e.g., WPI 330.32 (Employment Discrimination—Disability Discrimination—Disparate Treatment—Burden of Proof) and WPI 330.31 (Employment Discrimination—Disability Discrimination—Definition of Disability).

Once the plaintiff establishes a prima facie case of discrimination on the basis of a disparate impact theory, "the burden shifts to the defendant to show that the challenged requirement has a 'manifest relationship' to the position in question." Shannon, 104 Wn.2d at 727 (citing Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)).

> Washington cases have likewise recognized "business necessity" as an affirmative defense for an employer responding to a disparate impact claim. See Shannon v. Pay 'N Save Corp., 104 Wn.2d 722, 730, 709 P.2d 799 (1985) (adopting Ninth Circuit's standard for proving business necessity articulated in Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir.1981)).

Fey v. State, 174 Wn.App. 435, 449, 300 P.3d 435 (2013). "If the employer meets this burden, the plaintiff may still prevail by showing that other less discriminatory alternatives can equally serve the employer's legitimate business requirements." Shannon, 104 Wn.2d at 727; see also Fahn v. Cowlitz Cnty., 93 Wn.2d 368, 380, 610 P.2d 857 (1980), amended, 621 P.2d 1293 (1981).

"[T]o establish a business necessity defense an employer must prove by professionally accepted measures that the hiring or promotion test utilized accurately predicts or significantly correlates with the

fundamental requirements of job performance . . . ." Shannon, 104 Wn.2d at 731. According to the court, this reaffirms the tenet that "discriminatory preference occurs when an objective measurement unrelated to job performance results in the under-representation of a protected class." Shannon, 104 Wn.2d at 731; see also Wash. v. Horning Bros., LLC, 339 F.Supp.3d 1106, 1132 (E.D. Wash. 2018) ("[A] plaintiff establishes a prima facie violation by showing that an employer uses 'a particular employment practice that causes a disparate impact on the basis of . . . sex. . . .'" (citing Ricci v. DeStefano, 557 U.S. 557, 578, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009))). An employer may defend "by demonstrating that the practice is job related for the position in question and consistent with business necessity." Horning Bros., 339 F.Supp.3d. at 1132 (citation omitted). A plaintiff may still succeed by showing that the employer refused to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs. Horning Bros., 339 F.Supp.3d. at 1132 (citation omitted).

[Current as of November 2020.]

WPI 330.04

EMPLOYMENT DISCRIMINATION—BONA FIDE OCCUPATIONAL QUALIFICATION (BFOQ) DEFENSE

It is unlawful for an employer to [refuse to hire] [discharge] any person because of such person's [age] [creed] [disability] [marital status] [national origin] [race] [religion] [gender] [sexual orientation] [honorably discharged veteran status] [military status]. It is a defense to (name of plaintiff)'s [refusal-to-hire] [discharge] claim if the requirement of (describe requirement) is a bona fide occupational qualification.

To establish that [his] [her] [its] requirement is a bona fide occupational qualification, (name of defendant) has the burden of proving both of the following propositions:

(1) That (name of defendant) applies the requirement uniformly to all [applicants for] [candidates for] [persons in] the job; [and]

(2) That all or substantially all individuals who fail to meet the requirement are unable to perform the job safely and efficientlyorthat excluding those individuals was essential to the purposes of the position.

If you find from your consideration of all of the evidence that (name of defendant) has proved that [his] [her] [its] decision [not to hire] [to discharge] (name of plaintiff) was based on a bona fide occupational qualification, then you should find in favor of (name of defendant) [on this claim]. If, however, you find from your consideration of all the evidence that (name of defendant) has failed to prove either proposition (1) or (2), then your verdict should be in favor of (name of plaintiff) [on this claim].

NOTE ON USE

Use this instruction as written when the defense of bona fide occupational qualification (BFOQ) is raised in a disparate treatment claim of failure-to-hire or discharge. If there are other claims or issues in the case, such as whether or not the plaintiff met non-discriminatory qualifications for the position, it may be necessary to modify this instruction or add other instructions.

Select the appropriate bracketed words or phrases.

COMMENT

This instruction is written to apply to disparate treatment claims of failure-to-hire, failure-to-promote, or failure-to-transfer in light of the specific language of RCW 49.60.180(1). See also RCW 49.60.180(4). The instruction is also written to apply to discharge cases in light of the holding in Kries v. WA-SPOK Primary Care, LLC, 190 Wn.App. 98, 128, 362 P.3d 974 (2015) ("the defense of a bona fide occupational qualification is available to the employer in a discharge case in addition to a refusal to hire case"). It can be modified to apply to other adverse actions that involve the bona fide occupational qualification (BFOQ) defense. In addition to the BFOQ defense, other related special defenses are available in age discrimination cases involving termination of employment. See RCW 49.60.205; RCW 49.44.090.

To establish a valid BFOQ defense, an employer must show that excluding members of the particular protected status group is essential to the purposes of the job or that all or substantially all persons in the class would be unable to efficiently perform the duties of the position and the essence of the operation would be undermined by hiring anyone in the excluded class. Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 357–58, 172 P.3d 688 (2007) (citing WAC 162-16-240 and Franklin Cnty. Sheriff's Off. v. Sellers, 97 Wn.2d 317, 646 P.2d 113 (1982)).

It is unclear whether race can ever be a BFOQ. See Blackburn v. State, 186 Wn.2d 250, 260, 375 P.3d 1076 (2016) ("RCW 49.60.180(3) allows limited exceptions for classifications only based on sex, not race," and commenting that application of the exceptions of RCW 49.60.180(1) or (4) is "doubtful"). But see WAC 162-16-240(1) (providing examples that "illustrate how the commission applies BFOQs: (1) Where it is necessary for the purpose of authenticity or genuineness (e.g., model, actor, actress) . . .")).

Although the typical BFOQ involves refusal to hire or discharge, the Washington Supreme Court has held that a staffing decision over a

single weekend was subject to BFOQ analysis. See Blackburn, 186 Wn.2d at 260. Accordingly, the bracketed options may need to be expanded if the adverse action in a particular case differs from a refusal to hire or discharge.

For a discussion of honorably discharged veteran status and military status, see the Comment to WPI 330.01 (Employment Discrimination—General—Disparate Treatment—Burden of Proof).

[Current as of November 2020.]

WPI 330.05

EMPLOYMENT DISCRIMINATION—RETALIATION

It is unlawful for an employer to retaliate against a person for

[opposing what the person reasonably believed to be discrimination on the basis of [(describe protected status)] [and] [or] [providing information to or participating in a proceeding to determine whether discrimination or retaliation occurred].

To establish a claim of unlawful retaliation by (name of employer), (name of plaintiff) has the burden of proving both of the following propositions:

(1) That (name of plaintiff) [was opposing what [he] [she] reasonably believed to be discrimination on the basis of [(describe protected status)] [or] [was [providing information to] [participating in] a proceeding to determine whether discrimination or retaliation had occurred]; and

(2) That a substantial factor in the decision to [discipline] [demote] [deny the promotion] [terminate] [not hire] was (name of plaintiff)'s [opposing what [he] [she] reasonably believed to be discrimination or retaliation] [or] [[providing information to] [participating in] a proceeding to determine whether discrimination or retaliation had occurred].

If you find from your consideration of all of the evidence that both of these propositions has been proved, then your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if any one of these propositions has not been proved, your verdict should be for (name of defendant) [on this claim].

(Name of plaintiff) does not have to prove that [his] [her]

[opposition] [participation in the proceeding] [was] [were] the only factor or the main factor in (name of defendant's) decision, nor does (name of plaintiff) have to prove that [he] [she] would not have been [disciplined] [demoted] [denied the promotion] [terminated] but for [his] [her] [opposition] [participation].

NOTE ON USE

Select or insert words or phrases and protected status as appropriate. Protected status may include but is not limited to age, creed, disability, marital status, national origin, race, religion, gender, sexual orientation, honorably discharged veteran status, military status, citizenship or immigration status, or use of a service animal by a person with a disability. RCW 49.60.020. Although the vast majority of cases are employment related, if the claim is not (i.e. against a union under RCW 49.60.190), then "employment" should not be used.

It may be appropriate to substitute other allegedly retaliatory acts in proposition (2). Also, this instruction may need to be modified if the retaliation involves the failure to hire.

When there is an issue about whether the action taken is sufficiently adverse, the definition of adverse action under WPI 330.06 (Employment Discrimination—Retaliation—Adverse Employment Action—Definition) is to be used along with this instruction. This instruction may need to be modified to instruct the jury regarding the nature of the adverse action taken and in dispute.

Use this instruction instead of WPI 330.01 (Employment Discrimination—General—Disparate Treatment—Burden of Proof) or WPI 330.02 (Employment Discrimination—Disparate Impact—Definition).

This instruction is not designed for use in a statutory "whistleblower" case pursuant to RCW Chapter 42.40.

For a discussion of honorably discharged veteran status and military status, see the Comment to WPI 330.01 (Employment Discrimination—General—Disparate Treatment—Burden of Proof).

COMMENT

This instruction has been modified for this edition to allow for any type of protected status to be added to the instruction. This was done for purposes of simplifying the instruction. The parties can modify this instruction to suit the particular facts of the case at issue.

The elements of a retaliation claim are based upon RCW 49.60.210 (1); Allison v. Hous. Auth., 118 Wn.2d 79, 821 P.2d 34 (1991); Lodis v. Corbis Holdings, Inc., 192 Wn.App. 30, 366 P.3d 1246 (2015) ("Lodis II"); Boyd v. State, 187 Wn.App. 1, 349 P.3d 864 (2015); Lodis v. Corbis Holdings, Inc., 172 Wn.App. 835, 292 P.2d 779 (2013) ("Lodis I"); Milligan v. Thompson, 110 Wn.App. 628, 42 P.3d 418 (2002); Francom v. Costco Wholesale Corp., 98 Wn.App. 845, 991 P.2d 1182 (2000). The Washington Supreme Court has recognized that RCW 49.60.210(1) creates a cause of action for job applicants who claim a prospective employer refused to hire them in retaliation for prior opposition to discrimination against a different employer. See Jin Zhu v. N. Cent. Educ. Serv. Dist. - ESD 171, 189 Wn.2d 607, 404 P.3d 505 (2017).

An adverse employment action will support an award of damages when "(1) [the employee] engaged in a statutorily protected activity, (2) the employer took an adverse employment action against the employee, and (3) there is a causal connection between the employee's activity and the employer's adverse action." Boyd, 187 Wn.App. at 11–12 (citing Estevez v. Fac. Club of Univ. of Wash., 129 Wn.App. 774, 120 P.3d 579 (2005)); see also Davis v. West One Auto. Grp., 140 Wn.App. 449, 166 P.3d 807 (2007); Coville v. Cobarc Servs., Inc., 73 Wn.App. 433, 869 P.2d 1103 (1994) (adding the term "opposition").

In Lodis v. Corbis Holdings, Inc., 172 Wn.App. 835, 292 P.3d 779 (Lodis I), the court held that a human resource director did not need to "step outside" his ordinary job duties in order to oppose alleged discrimination by the company's CEO. The court declined to follow federal precedent holding that human resource professionals doing their jobs were not engaged in protected oppositional activity. The Washington Law Against Discrimination's (WLAD) protections against retaliation extend beyond employees to independent contractors. Currier v. Northland Servs., Inc., 182 Wn.App. 733, 332 P.3d 1006 (2014).

Protected activity. The employee must oppose "practices forbidden by this chapter," i.e., the law against discrimination, and opposition to a practice not forbidden by the statute is not protected activity. Coville, 73 Wn.App. at 440. RCW 49.60.210(2) makes it unlawful for a government agency or government manager or supervisor to retaliate against a "whistleblower" as defined in RCW Chapter 42.40, however, unless the retaliation is for complaining of discrimination. The elements of a statutory "whistleblower" claim differ from those under RCW 49.60.210(1), and a different instruction should be used.

In Ellis v. City of Seattle, 142 Wn.2d 450, 13 P.3d 1065 (2000), the court held that to establish a RCW Chapter 49.60 claim of retaliation, the employee need only show he/she reasonably believed there was

discrimination and complained about it, and need not prove actual discrimination.

Adverse employment action. Adverse employment actions involve a change in employment that is more than an inconvenience or alteration of one's job responsibilities. Boyd, 187 Wn.App. 1. The distinction between an adverse employment action and a mere "inconvenience" or "alterations of one's job responsibilities" is not a bright line. See Alonso v. Qwest Commc'ns Co., LLC, 178 Wn.App. 734, 747, 315 P.3d 610 (2013) (whether loss of certain van and cellular phone benefits constituted adverse employment action is an issue of fact for the jury). Adverse employment actions may include: failure to promote, Davis v. Dep't of Lab. & Indus., 94 Wn.2d 119, 615 P.2d 1279 (1980); reduction of pay, Kirby v. City of Tacoma, 124 Wn.App. 454, 98 P.3d 827 (2004); demotion or transfer, Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.3d 611 (2002); and poor performance rating preventing rehiring, Cornwell v. Microsoft Corp., 192 Wn.2d 403, 430 P.3d 229 (2018).

An adverse employment action is one that would "dissuad[e] a reasonable worker from making or supporting a charge of discrimination." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). See the Note on Use for WPI 330.06 (Employment Discrimination—Retaliation—Adverse Employment Action—Definition).

One federal district court applying WLAD concluded Washington appellate courts would likely recognize a retaliatory hostile work environment claim. Trizuto v. Bellevue Police Dep't, 983 F.Supp.2d 1277 (W.D. Wash. 2013).

Substantial factor. An individual asserting a claim under this provision must prove a retaliatory motive was a "substantial factor" in the challenged decision, but need not prove it was the only factor or a "determining factor." Allison, 118 Wn.2d 79. Complaints about the conduct of a supervisor that do not allege discrimination are insufficient to impute knowledge of protected opposition to employer. Graves v. Dep't of Game, 76 Wn.App. 705, 712, 887 P.2d 424 (1994) (citing Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 69, 821 P.2d 18 (1991)).

[Current as of November 2020.]

WPI 330.06

EMPLOYMENT DISCRIMINATION—RETALIATION—ADVERSE EMPLOYMENT ACTION—DEFINITION

The term "adverse" means unfavorable or disadvantageous. An employment action is adverse if it is harmful to the point that it would dissuade a reasonable employee from making a complaint of [discrimination] [harassment] [and] [or] [retaliation]. Whether a particular action is adverse is judged from the perspective of a reasonable person in the plaintiff's position.

NOTE ON USE

Use this instruction with WPI 330.05 (Employment Discrimination—Retaliation) when there is an issue whether the change is sufficiently adverse.

If both disparate treatment and retaliation are involved, combine the instruction with WPI 330.01.02 (Employment Discrimination—Disparate Treatment—Adverse Employment—Definition) to differentiate adverse employment action in disparate treatment claims from adverse employment action in retaliation claims.

COMMENT

In Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 67–68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006), the United States Supreme Court distinguished an adverse employment action in the context of a retaliation claim versus a disparate treatment claim. Whereas an adverse employment action for purposes of a disparate treatment claim must materially affect the terms and conditions of a person's employment, an adverse action in the context of a retaliation claim need not materially affect the terms and conditions of employment so long as a reasonable employee would have found the action materially adverse, which means it might have "dissuaded a reasonable worker from making or supporting a charge of discrimination" or deterred the charging party from engaging in protected activity. See also Ray v. Henderson, 217 F.3d 1234, 1241–43 (9th Cir. 2000); Trizuto v. Bellevue Police Dep't, 983 F.Supp.2d 1277 (W.D. Wash. 2013).

In Tyner v. State, 137 Wn.App. 545, 564–65,154 P.3d 920 (2007),

Washington first adopted Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). The primary change in Tyner's work conditions was a reassignment. The court held the crucial test was whether the change would dissuade a reasonable employee from making a complaint. The determination had to be based on the circumstances of the particular case.

Boyd v. Department of Social & Health Services, 187 Wn.App. 1, 349 P.3d 864 (2015), followed *Tyner,* and explicitly approved an instruction that contained the second sentence of this instruction—that the action must be one that would dissuade a reasonable employee from making a complaint. *Boyd* likewise affirmed *Tyner* that whether the action at issue is adverse depends on the circumstances of the particular case because "context matters." Boyd, 187 Wn.App. at 13. *Boyd* involved a series of actions, including a two-week suspension without pay, a written reprimand, and a report to the police. Without deciding whether each individual action was adverse, a reasonable jury could find that the actions, taken together, were adverse. The court further affirmed that adversity is assessed from a reasonable employee in plaintiff's position. Boyd, 187 Wn.App. at 13–14; see also, Cornwell v. Microsoft Corp., 192 Wn.2d 403, 412 n.4, 430 P.3d 229 (2018) (a poor performance rating preventing future rehiring "undoubtedly" qualifies as an adverse employment action).

[Current as of October 2020.]

WPI 330.21

EMPLOYMENT DISCRIMINATION—WORKPLACE HARASSMENT—GENERAL

Harassment on the basis of [(describe protected status)] is unlawful [employment] discrimination.

NOTE ON USE

Select or insert words or phrases and protected status as appropriate. Protected status may include but is not limited to age, creed, disability, marital status, national origin, race, religion, gender, sexual orientation, honorably discharged veteran status, military status, citizenship or immigration status, or use of a service animal by a person with a disability. RCW 49.60.020. Although the vast majority of cases are employment related, if the claim is not (i.e. against a union under RCW 49.60.190), then "employment" should not be used.

Use this instruction with WPI 330.22 (Employment Discrimination—Sexual Harassment—Quid Pro Quo—Burden of Proof) or WPI 330.23 (Employment Discrimination—Workplace Harassment—Hostile Work Environment—Burden of Proof).

When necessary to avoid confusion, "sex" may be substituted for "gender" in sex discrimination cases. Washington's law against discrimination specifically provides that "sex" and "gender" are interchangeable. RCW 49.60.040(25).

For a claim of sex discrimination other than sexual harassment, use WPI 330.01 (Employment Discrimination—General—Disparate Treatment—Burden of Proof).

COMMENT

This instruction has been modified for this edition to allow for any type of protected status to be added to the instruction. This was done for purposes of simplifying the instruction. The parties can modify this instruction to suit the particular facts of the case at issue.

The rules against workplace harassment under RCW Chapter 49.60 were developed primarily in sexual harassment cases. RCW 49.60.180(3) provides that it is an unfair practice for any employer to discriminate in terms or conditions of employment, which applies equally to harassment on the basis of gender, sexual orientation, race, age, religion,

national origin, military status, disability, marital status, and the use of a dog guide or service animal, as well as actual or perceived HIV infection. See RCW 49.60.174; Robel v. Roundup Corp., 148 Wn.2d 35, 43, 59 P.3d 611 (2002); Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 404, 693 P.2d 708 (1985).

Washington has historically recognized two types of prohibited harassment under RCW Chapter 49.60: hostile work environment and quid pro quo harassment claims. See, e.g., DeWater v. State, 130 Wn.2d 128, 134, 921 P.2d 1059 (1996). Federal cases have questioned the utility of the distinction, tending to focus instead on whether a "tangible employment action" (as opposed to some other sort of change in the "terms and conditions" of employment) resulted from the harassment. See, e.g., Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752–54, 765–66, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). However, Washington cases continue to distinguish between hostile work environment and quid pro quo harassment claims. See Antonius v. King Cnty., 153 Wn.2d 256, 261, 103 P.3d 729 (2005); Washington v. Boeing Co., 105 Wn.App. 1, 9–10, 19 P.3d 1041 (2000); Henningsen v. Worldcom, Inc., 102 Wn.App. 828, 835–37, 9 P.3d 948 (2000).

Because of the nature of quid pro quo claims, they are likely to arise only in sex discrimination cases. But hostile work environment claims have been recognized in cases alleging discrimination on the basis of sex (Glasgow, 103 Wn.2d at 405–07), disability (Robel, 148 Wn.2d at 43–45), and race (Washington, 105 Wn.App. at 12–13; Fisher v. Tacoma Sch. Dist., 53 Wn.App. 591, 595, 769 P.2d 318 (1989)).

For a discussion of the protected categories for honorably discharged veteran status and military status, see the Comment to WPI 330.01 (Employment Discrimination—General—Disparate Treatment—Burden of Proof).

[Current as of November 2020.]

WPI 330.22

EMPLOYMENT DISCRIMINATION—SEXUAL HARASSMENT—QUID PRO QUO—BURDEN OF PROOF

To establish [his] [her] claim of sexual harassment, (name of plaintiff) has the burden of proving each of the following propositions:

(1) That a [supervisor] [manager] subjected (name of plaintiff) to unwelcome sexual conduct or advances; and

(2) That the [supervisor] [manager] expressly or implicitly [promised] [threatened] a change in (name of plaintiff)'s [status] [conditions] [if] [unless] (name of plaintiff) submitted to the conduct or advances.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if any of these propositions has not been proved, then your verdict should be for (name of defendant) [on this claim].

NOTE ON USE

The bracketed alternatives in this instruction are not necessarily mutually exclusive.

For cases involving other verbal or physical conduct of a sexual nature, see WPI 330.23 (Employment Discrimination—Workplace Harassment—Hostile Work Environment—Burden of Proof).

This instruction does not cover the claim of an individual who may claim quid pro quo sexual harassment by virtue of sexual advances toward other employees that affect the terms and conditions of the plaintiff's employment. A modified instruction should be prepared for such claims.

Use this instruction with WPI 330.21 (Employment Discrimina-

tion—Workplace Harassment—General) in a "quid pro quo" sexual harassment case. The instruction must also be adapted for a case brought by a plaintiff other than the employee from whom the sexual favors were sought.

If the bracketed word "manager" is selected in this instruction, then also use the corresponding definition from the first sentence of WPI 330.24 (Employment Discrimination—Harassment—Hostile Work Environment—"Manager" and "Management"—Definitions). There is no corresponding definition for "supervisor." See the Comment.

COMMENT

This instruction is adapted from DeWater v. State, 130 Wn.2d 128, 134–35, 921 P.2d 1059 (1996). *DeWater* does not require a tangible job benefit or detriment as an element of quid pro quo harassment. See DeWater, 130 Wn.2d at 134–35. Nor does Schonauer v. DCR Ent., Inc., 79 Wn.App. 808, 823 n.26, 905 P.2d 392 (1995). But see Henningsen v. Worldcom, Inc., 102 Wn.App. 828, 840, 9 P.3d 948 (2000); Thompson v. Berta Enter., Inc., 72 Wn.App. 531, 537 n.5, 864 P.2d 983 (1994).

In contrast to a hostile work environment case, the actor's conduct need not be pervasive; one incident may be sufficient to support a cause of action. Schonauer, 79 Wn.App. at 823.

An employer is "strictly liable for quid pro quo harassment [by a supervisor who has] actual or apparent authority to make employment decisions on behalf of the employer." DeWater, 130 Wn.2d at 135.

The sexual favors sought by an employer or supervisor need not be for the employer or supervisor directly. Schonauer, 79 Wn.App. at 823–24 (purpose behind harassment was to gratify customers).

EEOC Guidelines for Title VII, § 703, provide for the possibility of a quid pro quo sexual harassment suit by co-workers of an individual shown "sexual favoritism," at least when it is based on submission to explicit or implicit coercive requests for sexual favors as opposed to voluntary romantic relationships. See 29 C.F.R. § 1604.11(g), and EEOC Policy Guide on Employer Liability for Sexual Favoritism under Title VII (1990), 405 Fair Employment Practices 6817, and federal cases cited therein.

While there are no decisions under RCW Chapter 49.60 that define "supervisor," courts have indicated a supervisor is lower than a managerin an employer's hierarchy. See Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 407, 693 P.2d 708 (1985); Henningsen v. Worldcom, Inc., 102 Wn.App. 828, 838, 9 P.3d 948 (2000).

Relying on Vance v. Ball State, 570 U.S. 421, 133 S.Ct. 2434, 186 L.Ed.2d 565 (2013), the court in Ellorin v. Applied Finishing, Inc., 996 F.Supp. 2d 1070, 1084–85 (W.D. Wash. 2014), defined a supervisor as a person who could play a significant, possibly determinative role in such matters as hiring, firing, failing to promote or reassignment with significantly different responsibilities.

[Current as of October 2020.]

WPI 330.23

EMPLOYMENT DISCRIMINATION—WORKPLACE HARASSMENT—HOSTILE WORK ENVIRONMENT—BURDEN OF PROOF

To establish [his] [her] claim of harassment on the basis of [(describe protected status)], (name of plaintiff) has the burden of proving each of the following propositions:

(1) That there was language or conduct concerning [(describe the language or conduct related to protected status)];

(2) That this language or conduct was unwelcome in the sense that (name of plaintiff) regarded the conduct as undesirable and offensive, and did not solicit or incite it;

(3) That this conduct or language was so offensive or pervasive that it altered the conditions of (name of plaintiff)'s employment; and

(4) Either:

(a) That an owner, manager, partner, or corporate officer of (name of employer) participated in the conduct or language; or

(b) That management knew, through complaints or other circumstances, of this conduct or language, and (name of employer) failed to take reasonably prompt and adequate corrective action reasonably designed to end it; or

(c) That management should have known of this harassment, because it was so pervasive or through other circumstances, and (name of employer) failed to take reasonably prompt and adequate corrective action reasonably designed to end it.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if any of these propositions has not been proved, your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

Select or insert words or phrases and protected status as appropriate. Protected status may include but is not limited to age, creed, disability, marital status, national origin, race, religion, gender, sexual orientation, honorably discharged veteran status, military status, citizenship or immigration status, or use of a service animal by a person with a disability. RCW 49.60.020. Although the vast majority of cases are employment related, if the claim is not (i.e. against a union under RCW 49.60.190), then "employment" should not be used.

Use this instruction with WPI 330.21 (Employment Discrimination—Workplace Harassment—General) in a "hostile work environment" harassment case.

When the harassment is alleged to be on the basis of age, add the following proposition: "That the plaintiff was 40 years of age or older." See RCW 49.60.205 and RCW 49.44.090.

When the harassment is alleged to be on the basis of disability, add the following proposition: "That the plaintiff had a disability." See Robel v. Roundup Corp., 148 Wn.2d 35, 45, 59 P.3d 611 (2002). "Disability" should be defined using WPI 330.31 (Employment Discrimination—Disability Discrimination—Definition of Disability).

When the harassment is alleged to be on the basis of actual or perceived HIV infection, or actual or perceived hepatitis C infection, add the following proposition: "That plaintiff had an actual or perceived HIV (or hepatitis C) infection." See RCW 49.60.174(1). No such additional proposition is necessary for harassment alleged to be on the basis of race, sex, religion, creed, national origin, or marital status.

When necessary to avoid confusion, "sex" may be substituted for "gender" in sex discrimination cases. Washington's law against discrimination specifically provides that "sex" and "gender" are interchangeable. RCW 49.60.040(25).

Use this instruction with WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

COMMENT

This instruction has been modified for this edition to allow for any type of protected status to be added to the instruction. This was done for purposes of simplifying the instruction. The parties can modify this instruction to suit the particular facts of the case at issue.

This instruction is based on RCW 49.60.180, Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 693 P.2d 708 (1985), and Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.3d 611 (2002). It applies to workplace harassment generally. See discussion in the Comment to WPI 330.21 (Employment Discrimination—Workplace Harassment—General).

The first requirement of a workplace harassment claim, as *Glasgow* explains, is that "the conduct complained of must be unwelcome in the sense that the plaintiff-employee did not solicit or incite it, and in the further sense that the employee regarded the conduct as unwelcome." Glasgow, 103 Wn.2d at 406.

Second, the employee must prove the conduct was because of plaintiff's membership in a protected class. For example, if the protected class is gender, the plaintiff must prove that the conduct would not have occurred had the employee been of a different sex. Schonauer v. DCR Ent., Inc., 79 Wn.App. 808, 820, 905 P.2d 392 (1995) (citing *Glasgow*). In such a case, gender must be the "motivating factor" for the conduct. Payne v. Children's Home Soc. of Wash., Inc., 77 Wn.App. 507, 513, 892 P.2d 1102 (1995); Coville v. Cobarc Servs., Inc., 73 Wn.App. 433, 869 P.2d 1103 (1994). As long as the conduct is "because of sex," it need not be "sexual in nature" or "involve sexual advances, innuendo, or physical conduct to be actionable." Payne, 77 Wn.App. at 512–13. Same-sex harassment is illegal when it is "because of sex." Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (Title VII case).

Similarly, if the harassment is based on membership in another protected class such as disability, the conduct or language "directly or proximately related to" a disability is "because of" a disability. Robel, 148 Wn.2d at 45–46.

Third, the employee must prove the conduct affected his or her terms or conditions of employment. Conduct affects the terms or conditions of employment "if it is 'sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment.' " Glasgow, 103 Wn.2d at 406. Whether conduct meets this test depends on the "totality of the circumstances," Glasgow, 103 Wn.2d at 407, "including the frequency and severity of harassing conduct, whether it

was physically threatening or humiliating or merely an offensive utterance, and whether it unreasonably interfered with the employee's work performance." Davis v. Fred's Applicance, Inc., 171 Wn.App. 348, 362, 287 P.3d 51 (2012); Schonauer, 79 Wn.App. at 820–21 (quoting Harris v. Forklift Sys., 510 U.S. 17, 20, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)); Graves v. Dep't of Game, 76 Wn.App. 705, 887 P.2d 424 (1994) (conduct insufficiently pervasive or abusive to affect emotional or psychological wellbeing of employee).

See also Arthur v. Whitman Cnty., 24 F.Supp.3d 1024 (E.D. Wash. 2014) (a hostile work environment claim may be composed of a series of separate acts that collectively constitute one unlawful employment practice); Trizuto v. Bellevue Police Dep't, 983 F.Supp.2d 1277 (W.D. Wash. 2013); Blackburn v. Dep't of Soc. & Health Servs., 186 Wn.2d 250, 375 P.3d 1076 (2016) (a single weekend staffing decision based on race is not sufficiently severe or pervasive); Estevez v. Faculty Club of Univ. of Wash., 129 Wn.App. 774, 793, 120 P.3d 579 (2005).

Fourth, to establish employer liability:

> the employee must prove that the conduct is imputable to the employer. Conduct is imputable to the employer if it is the conduct of an owner, manager, partner, or corporate officer, or, alternatively, if it is the conduct of a supervisor which the employer authorized, knew of, or should have known of, and the employer "failed to take reasonably prompt and adequate corrective action."

Schonauer, 79 Wn.App. at 821 (quoting Glasgow, 103 Wn.2d at 407). Cf. Thompson v. Berta Enters. Inc., 72 Wn.App. 531, 864 P.2d 983 (1994) (insufficient evidence employer knew or should have known).

Washington cases appear to use the terms supervisor or manager interchangeably. In Davis v. Fred's Appliance, Inc., 171 Wn.App. 348, 362–63, 287 P.3d 51 (2012), the court injected a new term of "alter ego" to automatically impute liability to the employer. The distinction between the various labels is unclear. See the Comment to WPI 330.24 (Employment Discrimination—Harassment—Hostile Work Environment—"Manager" and "Management"—Definitions).

Finally, note that the distinction between quid pro quo and hostile work environment sexual harassment may not be precise, especially if implicit quid pro quo harassment is alleged. See Nichols v. Frank, 42 F.3d 503 (9th Cir. 1994).

For a discussion of the protected categories for honorably discharged veteran status and military status, see the Comment to WPI 330.01

(Employment Discrimination—General—Disparate Treatment—Burden of Proof).

[Current as of November 2020.]

WPI 330.24

EMPLOYMENT DISCRIMINATION—HARASSMENT—HOSTILE WORK ENVIRONMENT—"MANAGER" AND "MANAGEMENT"—DEFINITIONS

A "manager" is a person who has the authority and power to affect hours, wages, and working conditions. "Management" means one or more managers.

NOTE ON USE

Use this instruction with WPI 330.23 (Employment Discrimination—Workplace Harassment—Hostile Work Environment—Burden of Proof).

The first sentence of this instruction may also be used along with WPI 330.22 (Employment Discrimination—Sexual Harassment—Quid Pro Quo—Burden of Proof). See the Note on Use to WPI 330.22 (Employment Discrimination—Sexual Harassment—Quid Pro Quo—Burden of Proof).

COMMENT

This instruction is drawn from Robel v. Roundup Corp., 148 Wn.2d 35, 48 n.5, 59 P.3d 611 (2002) ("[m]anagers are those to whom the employer has given authority and power to affect the hours, wages and working conditions of the employer's workers"). See also Francom v. Costco Wholesale Corp., 98 Wn.App. 845, 991 P.2d 1182 (2000); Alonzo v. Qwest Commc'n Co., LLC, 178 Wn.App. 734, 752, 315 P.3d 610 (2013); Hotchkiss v. CSK Auto Inc., 918 F.Supp. 2d 1108, 1119–120 (E.D. Wash. 2013) (citing Washington v. Boeing, 105 Wn.App. 1, 11, 19 P.3d 1041 (2000)).

For additional discussion of the manager and supervisor distinction, if any, see Comment to WPI 330.23 (Employment Discrimination—Workplace Harassment—Hostile Work Environment—Burden of Proof).

[Current as of October 2020.]

WPI 330.31

EMPLOYMENT DISCRIMINATION—DISABILITY DISCRIMINATION—DEFINITION OF DISABILITY

A disability is a sensory, mental, or physical impairment that:

(1) Is medically recognized or diagnosable; or

(2) Exists as a record or history [; or]

[(3) Is perceived by the employer to exist, whether or not it exists in fact].

[A disability may exist whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, whether or not it limits the ability to work generally or work at a particular job, or whether or not it limits any other activity.]

NOTE ON USE

Use this instruction with either WPI 330.32 (Employment Discrimination—Disability Discrimination—Disparate Treatment—Burden of Proof) or WPI 330.33 (Employment Discrimination—Disability Discrimination—Reasonable Accommodation—Burden of Proof). Use the bracketed final sentence if it will be helpful to the jury. See discussion in the Comment.

If there is a claim brought under the Americans with Disabilities Act (ADA), use the definition of "disability" in the ADA at 42 U.S.C. § 12102. See discussion in the Comment regardingthe definition of disability under the ADA Amendments Act of 2008.

COMMENT

This instruction is derived from RCW 49.60.040(7).

Disability discrimination. RCW 49.60.180 provides that it is an unfair practice for an employer to discriminate in various employment decisions "because of . . . the presence of any sensory, mental, or physical disability . . . ." RCW 49.60.180(1), (2), (3), and (4).

Liability in a disparate treatment case may be based upon the

employer's perception that the plaintiff is disabled. Taylor v. Burlington N. R.R. Holdings, Inc., 193 Wn.2d 611, 632, 444 P.3d 606 (2019); Clipse v. Com. Driver Servs., Inc. 189 Wn.App. 776, 794, 358 P.3d 464 (2015); Barnes v. Wash. Natural Gas Co., 22 Wn.App. 576, 591 P.2d 461 (1979).

Conditions do not need to be permanent in order to qualify as disabilities. RCW 49.60.040(7)(b); see Pulcino v. Fed. Express Corp., 141 Wn.2d 629, 643–44, 9 P.3d 797 (2000).

Definition of disability. The definitions of "disability" under state and federal law differ. Compare RCW 49.60.040(7)(a) to (c), with the ADA Amendments Act of 2008, 42 U.S.C. § 12102. The ADA defines disability as: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." In comparison, the definition of "disability" under Washington's Law Against Discrimination (WLAD) is broader and provides additional protections to Washington employees. See Hale v. Wellpinit Sch. Dist. No. 49, 165 Wn.2d 494, 501–02, 198 P.3d 1021 (2009) (acknowledging that the Washington legislature in adopting its definition of "disability" in 2007 specifically intended to employ a broader definition of "disability" and that "the [Washington] Law Against Discrimination affords to state residents protections that are wholly independent of those afforded by the federal Americans with Disabilities Act . . ."); Taylor, 193 Wn.2d at 632 (same).

For additional information about the statutory definition of "disability" and its application under Washington law, please refer to RCW 49.60.040(7) and the Washington State Human Rights Commission's website at www.hum.wa.gov.

Pregnancy. Claims of pregnancy discrimination are analyzed under a gender discrimination rather than a disability framework. Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 350, 172 P.3d 688 (2007). The Human Rights Commission website (www.hum.wa.gov) has a useful discussion of what may or may not constitute a disability under Washington law.

[Current as of October 2020.]

WPI 330.31.01

EMPLOYMENT DISCRIMINATION—DISABILITY DISCRIMINATION—DEFINITION OF IMPAIRMENT

An impairment includes [but is not limited to]:

[a] [physiological disorder], [or] [condition], [cosmetic disfigurement], [or] [anatomical loss] affecting one [or more of] the following body system[s]: [neurological], [musculo-skeletal], [special sense organs], [respiratory], [including speech organs], [cardio-vascular], [reproductive], [digestive], [genitor-urinary], [hemic and lymphatic], [skin], [and] [endocrine][; or]

[any [mental], [developmental], [traumatic], [or] [psychological] disorder including [but not limited to] [cognitive limitation], [organic brain syndrome], [emotional or mental illness], [and] [specific learning disabilities]].

NOTE ON USE

The definition of "impairment" found at RCW 49.60.040(7)(c) should be used with both disparate treatment and accommodation cases. See also WPI 330.33 (Employment Discrimination—Disability Discrimination—Reasonable Accommodation—Burden of Proof) for the impairment instruction in accommodation cases.

Use the bracketed language as appropriate for the type of impairment claimed.

COMMENT

The definition of "impairment" is now codified in RCW 49.60.040 (7)(c) and should be used with WPI 330.31 (Employment Discrimination—Disability Discrimination—Definition of Disability) and WPI 330.33 (Employment Discrimination—Disability Discrimination—Reasonable Accommodation—Burden of Proof).

An impairment may be temporary, common or uncommon, mitigated or unmitigated, and, for purposes of disparate treatment, an impairment need not limit the ability to work generally or to work at a partic-

ular job whether or not it limits other activities covered by RCW Chapter 49.60. RCW 49.60.040(7)(b).

In Clipse v. Commercial Driver Services, Inc., 189 Wn.App. 776, 792–93, 358 P.3d 464 (2015), the court affirmed a jury verdict in favor of a plaintiff who had been denied employment as a truck driver instructor because of his use of the prescription drug methadone. In addressing the question of whether methadone use constituted a "disability" under the Washington Law Against Discrimination (WLAD), the court held that the use of prescription medications may constitute a "disability" under the WLAD if the medications cause physically impairing side effects.

Obesity always qualifies as an impairment under the plain language of RCW 49.60.040(7)(c)(i)

> because it is recognized by the medical community as a "physiological disorder, or condition" that affects multiple body systems listed in the statute. Therefore, if an employer refuses to hire someone because the employer perceives the applicant to have obesity, and the applicant is able to properly perform the job in question, the employer violates this section of the WLAD.

Taylor v. Burlington N. R.R. Holdings, Inc., 193 Wn.2d 611, 615, 444 P.3d 606 (2019).

[Current as of October 2020.]

WPI 330.32

EMPLOYMENT DISCRIMINATION—DISABILITY DISCRIMINATION—DISPARATE TREATMENT—BURDEN OF PROOF

Discrimination in employment on the basis of disability is prohibited.

To establish [his] [her] claim of discrimination on the basis of disability, (name of plaintiff) has the burden of proving each of the following propositions:

(1) That [he] [she] [has a disability] [or] [is perceived to have a disability];

(2) That [he] [she] is able to perform the essential functions of the job in question [with reasonable accommodation]; and

(3) That [his] [her] [disability] [or] [the perception of [his] [her] disability] was a substantial factor in (name of defendant's) decision [to terminate] [not to promote] [not to hire] [him] [her] [to lay [him] [her] off]. (Name of plaintiff) does not have to prove that [perceived] disability was the only factor or the main factor in the decision. Nor does (name of plaintiff) have to prove that [he] [she] would have been [retained] [hired] [promoted] but for [his] [her] [perceived] disability.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if any of these propositions has not been proved, your verdict should be for (name of defendant) [on this claim].

NOTE ON USE

Use this instruction, rather than WPI 330.01 (Employment

Discrimination—General—Disparate Treatment—Burden of Proof), in a case of discriminatory treatment when the basis of the claim is disability.

Use WPI 330.31 (Employment Discrimination—Disability Discrimination—Definition of Disability) and WPI 330.31.01 (Employment Discrimination—Disability Discrimination—Definition of Impairment) with this instruction.

In a "reasonable accommodation" case in which the primary allegation is that the employer has not met its obligation to accommodate the disability, use WPI 330.33 (Employment Discrimination—Disability Discrimination—Reasonable Accommodation—Burden of Proof) and accompanying instructions, instead of this instruction.

A separate "essential functions" instruction may be appropriate, depending on the facts and circumstances of the particular case. See WPI 330.37 (Employment Discrimination—Essential Function—Definition); see also the Comment below for a discussion of essential functions.

Use the bracketed words as appropriate for the type of claim being made. In proposition (2), use the bracketed phrase "with reasonable accommodation" and the definition of reasonable accommodation in WPI 330.34 (Employment Discrimination—Disability Discrimination—Reasonable Accommodation—Definition) if, in order to make a threshold showing of qualification for the position, the plaintiff must show that he or she could perform the job's essential functions with reasonable accommodation. The phrase and definition of reasonable accommodation will not be used if the plaintiff does not assert that accommodation would be necessary. If the employer presents a defense of undue hardship, the jury must be instructed on undue hardship. See WPI 330.36 (Employment Discrimination—Disability Discrimination—Undue Hardship—Burden of Proof).

In some circumstances, it may be appropriate to give WPI 330.04 (Employment Discrimination—Bona Fide Occupational Qualification (BFOQ) Defense) with this instruction. See the Comment below.

COMMENT

Discriminatory treatment due to disability. Most reported Washington cases of employment discrimination based on disability involve issues of reasonable accommodation. Those issues are addressed later in this chapter. For case law discussion about other issues related to disability discrimination cases, see Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 172 P.3d 688 (2007); Roeber v. Dowty Aerospace Yakima,

116 Wn.App. 127, 64 P.3d 691 (2003); Bass v. City of Tacoma, 90 Wn.App. 681, 953 P.2d 129 (1998), amended, 976 P.2d 1248 (1999); Parsons v. St. Joseph's Hosp. & Health Care Ctr., 70 Wn.App. 804, 856 P.2d 702 (1993); Barnes v. Wash. Natural Gas Co., 22 Wn.App. 576, 591 P.2d 461 (1979). See also WAC 162-16-240 on bona fide occupational requirements.

In Johnson v. Chevron U.S.A., Inc., 159 Wn.App. 18, 33–34, 244 P.3d 438 (2010), the court disapproved of a jury instruction which included a requirement that the plaintiff prove that he was "treated differently" from non-disabled employees:

> Proof of different treatment by way of comparator evidence is relevant and admissible but not required, and in many cases is not obtainable. Disability cases in particular often involve situations where, because of the unique nature of the disability, there is no relevant comparison evidence. Indeed, requiring a disability plaintiff to prove he was treated differently from nondisabled employees contradicts the employer's affirmative obligation to treat that employee differently by offering accommodation.

Motive or intent to discriminate. In Parsons v. St. Joseph's Hospital and Health Care Center, 70 Wn.App. 804, 856 P.2d 702 (1993), the plaintiff claimed she had been fired because of her disability. The employer responded that she was fired due to unsatisfactory job performance. The court distinguished the case from one in which the plaintiff claimed that the employer had failed to make reasonable accommodation for her disability, i.e., that the employer should have treated her differently from other employees. Rather, "the central issue . . . is whether St. Joseph's acted with a discriminatory motive or intent." Parsons, 70 Wn.App. at 807.

"Perceived as." If an employer perceives an employee to have a disability and treats the employee adversely based on that perception, the employee can establish a disparate treatment claim even though the employee is not in fact disabled. Taylor v. Burlington N. R.R. Holdings, Inc., 193 Wn.2d 611, 615, 444 P.3d 606 (2019); Barnes v. Wash. Nat. Gas Co., 22 Wn.App. 576, 591 P.2d 461 (1979). See WPI 330.31 (Employment Discrimination—Disability Discrimination—Definition of Disability).

Substantial factor. In MacKay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 898 P.2d 284 (1995), the court held that the "substantial factor" test, rather than a "determining factor" test, was the appropriate standard for deciding whether an employer's adverse employment decision was "because of" one of the prohibited factors enumerated in RCW 49.60.180(2), including disability. See Comment to WPI 330.01 (Employment Discrimination—Discrimination—General—Disparate Treatment—Burden of Proof).

Note that disability claims brought under the Americans with Disabilities Act (ADA) require a plaintiff to prove that "but for" the illicit motive of a disability, he or she would not have been subjected to the adverse job action. See Brownfield v. City of Yakima, 178 Wn.App. 850, 872–73, 316 P.3d 520 (2014), addressing the distinction between the plaintiff's burden in claims brought under the ADA versus claims brought under the Washington Law Against Discrimination (WLAD).

Bona fide occupational qualifications (BFOQ). See WPI 330.04 (Employment Discrimination—Bona Fide Occupational Qualification (BFOQ) Defense). See Hegwine, 162 Wn.2d at 357–58; Brady v. Daily World, 105 Wn.2d 770, 777, 718 P.2d 785 (1986), overruled on other grounds by Hill v. BCTI Income Fund–I, 144 Wn.2d 172, 188 n.10, 23 P.3d 440 (2001); Blanchette v. Spokane Cnty. Fire Protection Dist. No. 1, 67 Wn.App. 499, 836 P.2d 858 (1992); see also Kries v. WA-SPOK Primary Care, LLC, 190 Wn.App. 98, 129, 362 P.3d 974 (2015), in which the court held that the BFOQ defense may be available in a discharge case as well as a refusal to hire case.

The court noted in Fey v. State, 174 Wn.App. 435, 447–48, 300 P.3d 435 (2013), that an employer relying on a BFOQ defense to justify a facially discriminatory qualification:

> must either have a factual basis for believing that all or substantially all persons who lack the qualification would be unable to safely and efficiently perform the duties of the job, or beable to prove that some excluded employees would be unable to perform safely and efficiently and it is impossible or highly impractical for the employer to distinguish the employees who do or do not present the risk.

Essential functions. In some cases, it may be appropriate to instruct jurors more specifically as to "essential functions." See, e.g., Hegwine, 162 Wn.2d 340; Davis v. Microsoft Corp., 149 Wn.2d 521, 70 P.3d 126 (2003); Griffith v. Boise Cascade, Inc., 111 Wn.App. 436, 45 P.3d 589 (2002); Tinjum v. Atl. Richfield Co., 109 Wn.App. 203, 34 P.3d 855 (2001); Dedman v. Wash. Pers. Appeals Bd., 98 Wn.App. 471, 989 P.2d 1214 (1999); see WPI 330.37 (Employment Discrimination—Essential Function—Definition).

Undue hardship. If the employer presents a defense of undue hardship, the jury must be instructed on undue hardship. Easley v. Sea-Land Serv. Inc., 99 Wn.App. 459, 464, 469–72,994 P.2d 271 (2000); see WPI 330.36 (Employment Discrimination—Disability Discrimination—Undue Hardship—Burden of Proof).

Business judgment rule. Under the business judgment rule, the

jury is not allowed to second-guess the defendant's business judgment and the jury may impose liability only for discriminatory conduct, not for conduct that was otherwise unreasonable or unfair. The trial court need not separately instruct the jury on the business judgment rule as long as the other instructions accurately state the essential elements of disability discrimination—the business judgment rule "add[s] nothing" to these essential elements. Burchfiel v. Boeing Corp., 149 Wn.App. 468, 491–93, 205 P.3d 145 (2009).

[Current as of October 2020.]

WPI 330.33

EMPLOYMENT DISCRIMINATION—DISABILITY DISCRIMINATION—REASONABLE ACCOMMODATION—BURDEN OF PROOF

Discrimination in employment on the basis of disability is prohibited. One form of unlawful discrimination is a failure to reasonably accommodate an employee's disability.

To establish [his] [her] claim of discrimination on the basis of failure to reasonably accommodate a disability, (name of plaintiff) has the burden of proving each of the following propositions:

(1) That [he] [she] had an impairment that is medically recognizable or diagnosable or exists as a record or history;

(2) That either

(a) the employee gave the employer notice of the impairment; or

(b) no notice was required to be given because the employer knew about the employee's impairment;

(3) That either:

(a) the impairment [has] [had] a substantially limiting effect on

(i) [his] [her] ability to [perform his or her job] [apply for a job] [be considered for a job]; or

(ii) [his] [her] ability to access [equal benefits] [privileges] [terms] [or] [conditions] of employment; or

(b) (name of plaintiff) has provided medical documentation to the employer establishing a reasonable likelihood that working without an accommodation would aggravate the impairment to the extent it would create a substantially limiting effect;

(4) That [he] [she] would have been able to perform the essential functions of the job in question with reasonable accommodation; and

(5) That the employer failed to reasonably accommodate the impairment.

In determining whether an impairment has a substantially limiting effect, a limitation is not substantial if it has only a trivial effect.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff [on this claim]. On the other hand, if any of these propositions has not been proved, your verdict should be for the employer[on this claim].

NOTE ON USE

Use this instruction with WPI 330.31 (Employment Discrimination—Disability Discrimination—Definition of Disability). This instruction is designed to be used together with WPI 330.34 (Employment Discrimination—Disability Discrimination—Reasonable Accommodation—Definition) and WPI 330.37 (Employment Discrimination—Essential Function—Definition) or, alternatively, WPI 330.36 (Employment Discrimination—Disability Discrimination—Undue Hardship—Burden of Proof).

An essential functions instruction may be appropriate depending on the facts and circumstances of the particular case. When there is a dis-

agreement as to the essential functions of the position, use WPI 330.37 (Employment Discrimination—Essential Function—Definition).

This instruction may need to be modified for cases involving medical necessity. See discussion in the Comment below.

COMMENT

In 2007, the Legislature adopted new definitions of disability and impairment in an accommodation analysis. RCW 49.60.040(7). See discussion in the Comment to WPI 330.01 (Employment Discrimination—General—Disparate Treatment—Burden of Proof).

For purposes of an accommodation analysis, "a limitation is not substantial if it has only a trivial effect." RCW 49.60.040(7)(e).

When duty to accommodate arises. Pursuant to RCW 49.60.040 (7)(d), the duty to accommodate arises in two general circumstances: (1) when the impairment has a substantially limiting effect on the employee's ability to perform the duties of the position or affect other aspects of his/her employment opportunities; or (2) when there is medical evidence that failure to accommodate a known impairment will aggravate the impairment, limiting the employee's ability to perform the job or affect other aspects of his/her employment opportunities. See Johnson v. Chevron U.S.A., Inc., 159 Wn.App. 18, 30, 244 P.3d 438 (2010):

> Under the new statute, the question is not whether the accommodation was "medically necessary" in order for Johnson to do his job, . . . Instead, it is whether Johnson's impairment had a substantially limiting effect upon his ability to perform the job such that the accommodation was reasonably necessary, or doing the job without accommodation was likely to aggravate the impairment such that it became substantially limiting.

In impairment cases, the Legislature clarified that the impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply for or be considered for a position, or the individual's access to equal benefits, privileges, or terms or conditions of employment. RCW 49.60.040(7)(d)(i). In the aggravation of impairment cases, the employee must notify the employer of the impairment, and provide medical documentation that establishes a reasonable likelihood that engaging in the employee's job function without an accommodation "would aggravate the impairment to the extent, that it would create a substantially limiting effect." RCW 49.60.040(7)(d)(ii).

The duty of reasonable accommodation does not arise until the

employer is "aware of respondent's disability and physical limitations." Goodman v. Boeing Co., 127 Wn.2d 401, 408, 899 P.2d 1265 (1995) (quoting Holland v. Boeing Co., 90 Wn.2d 384, 391, 583 P.2d 621 (1978)). If the disability is not otherwise known to the employer, the employee must give the employer notice of the disability; the employer then must take " 'positive steps' to accommodate the employee's limitations." Goodman, 127 Wn.2d at 408. Once notice is given, the employer has a duty to inquire regarding the nature and extent of the disability, while the employee has a duty to cooperate with the employer's efforts by explaining the employee's disability and qualifications. Goodman, 127 Wn.2d at 408–09; Hume v. Am. Disposal Co., 124 Wn.2d 656, 880 P.2d 988 (1994).

If there is a factual question whether the parties cooperated in the reasonable accommodation process, Washington law is unclear how non-cooperation impacts the burden of proof. See Comment to WPI 330.34 (Employment Discrimination—Disability Discrimination—Reasonable Accommodation—Definition).

Damages. In Martini v. Boeing, 137 Wn.2d 357, 367, 971 P.2d 45 (1999), the Washington Supreme Court held that an employee who resigned because of a failure to accommodate a disability was not required to prove constructive discharge before being entitled to damages under RCW 49.60.030(2). A plaintiff bringing a claim under RCW Chapter 49.60 need only establish that the damages were proximately caused by the discrimination. Martini, 137 Wn.2d at 368.

[Current as of October 2020.]

WPI 330.34

EMPLOYMENT DISCRIMINATION—DISABILITY DISCRIMINATION—REASONABLE ACCOMMODATION—DEFINITION

A reasonable accommodation is a measure that

[enables equal opportunity in the job application process] [or]

[enables the proper performance of the essential job functions] [or]

[enables the enjoyment of equal benefits, privileges, or terms and conditions of employment that are available to employees without disabilities].

Once an employer is on notice of an impairment, the employer has a duty to inquire about the nature and extent of the impairment. The [employee] [applicant] has a duty to cooperate with [his] [her] employer to explain the nature and extent of the [employee's] [applicant's] impairment and resulting limitations as well as [his] [her] qualifications.

An employer must provide a reasonable accommodation for [a qualified applicant] [an employee] with a disability unless the employer can show that the accommodation would impose an undue hardship on the employer. The obligation to reasonably accommodate applies to all aspects of employment, and an employer cannot deny an employment opportunity to a qualified applicant or employee because of the need to provide reasonable accommodation.

[There may be more than one reasonable accommodation of a disability.] Where multiple potential modes of accommodation exist, the employer is entitled to select the

mode of accommodation to the exclusion of other choices, if the accommodation is adequate.]

[An employer is not required to reassign an employee to a position that is already occupied, create a new position, or eliminate or reassign essential job functions as a reasonable accommodation.]

[The duty to accommodate is continuing. If an employer's first attempt at accommodation fails, it must continue to attempt modes of accommodation unless it can demonstrate that remaining modes of accommodation constitute an undue hardship. An employer's previously unsuccessful attempts at accommodation do not give rise to liability if the employer ultimately provides a reasonable accommodation.]

[A reasonable accommodation may include adjustments in the manner in which essential functions are carried out, work schedules, scope of work, and changes in the job setting or conditions of employment that enable the person to perform the essential functions of the job.]

[A reasonable accommodation may include unpaid medical leave.]

NOTE ON USE

The bracketed paragraphs are to be used in an appropriate case when there is a disagreement as to which of several accommodations might be considered reasonable, or when multiple modes of accommodation are attempted.

The list of accommodations in the instruction's final paragraph is not exclusive.

Use this instruction together with WPI 330.33 (Employment Discrimination—Disability Discrimination—Reasonable Accommodation—Burden of Proof), and in appropriate cases with WPI 330.36 (Employment Discrimination—Disability Discrimination—Undue Hardship—Burden of Proof) and WPI 330.37 (Employment Discrimination—Essential Function—Definition).

COMMENT

This instruction was modified for this edition to include unpaid medical leave as a reasonable accommodation. Kries v. WA-SPOK Primary Care, LLC, 190 Wn.App. 98, 143, 362 P.3d 974 (2015) (providing unpaid medical leave can qualify as a reasonable accommodation).

The first bracketed paragraph clarifies that when there are multiple modes of accommodating a disability, the employer may choose the accommodation. See Frisino v. Seattle Sch. Dist. No. 1, 160 Wn.App. 765, 779, 249 P.3d 1044 (2011) (citing Griffith v. Boise Cascade, Inc., 111 Wn.App. 436, 444, 45 P.3d 589 (2002)). See also Doe v. Boeing Co., 121 Wn.2d 8, 846 P.2d 531 (1993), in which the court stated that "the Act does not require the employer to offer the precise accommodation which [the plaintiff] requests." Doe, 121 Wn.2d at 20.

The second bracketed paragraph clarifies that employers are not required to reassign an employee to a position that is already filled, to create a new position, or to eliminate or reassign essential job functions. Pulcino v. Fed. Express Corp., 141 Wn.2d 629, 644, 9 P.3d 787 (2000) ("[a]n employer . . . is not required . . . to create a new position, to alter the fundamental nature of the job, or to eliminate or reassign essential job functions").

The third bracketed paragraph clarifies that the accommodation process is a continuing one, and that an employer may attempt different modes of accommodation unless remaining modes of accommodation constitute an undue hardship. An employer will not be liable for failing to accommodate if it ultimately provides a reasonable accommodation, even though original attempts at accommodation were unsuccessful. See Frisino, 160 Wn.App. at 781 (citing Sharpe v. Am. Tel. & Tel. Co., 66 F.3d 1045, 1051 (9th Cir. 1995)).

If an employee becomes disabled and cannot be accommodated in his or her position, the employer must take affirmative steps to help the employee identify and apply for any vacant position for which the employee is qualified. Davis v. Microsoft Corp., 149 Wn.2d 521, 536–37, 70 P.3d 126 (2003); Clarke v. Shoreline Sch. Dist. No. 412, 106 Wn.2d 102, 120, 720 P.2d 793 (1986); Dean v. Mun. of Metro. Seattle, 104 Wn.2d 627, 636, 708 P.2d 393 (1985); see also Havlina v. Dep't. of Transp., 142 Wn.App. 510, 178 P.3d 354 (2007) (the individual state agency is the employer, not the State of Washington). "The employee's reciprocal duties include informing the employer of his qualifications, 'applying for all jobs which might fit his abilities,' and 'accepting reasonably compensatory work he could perform.' " Davis, 149 Wn.2d at 537 (quoting *Dean*). This obligation continues after the employee is no longer

working for the employer, and "it is for the trier of fact to decide at what point continued attempts to accommodate become an undue burden as opposed to a reasonable requirement." Wheeler v. Catholic Archdiocese of Seattle, 65 Wn.App. 552, 829 P.2d 196 (1992), affirmed in part on other grounds, 124 Wn.2d 634, 880 P.2d 29 (1994).

No published Washington court decision has expressly approved a jury instruction addressing the requirement that the employer and employee communicate in developing a reasonable accommodation, but Washington courts have long held that employers and employees have an obligation to engage in an "interactive process" to develop a reasonable accommodation to allow a disabled employee to continue to perform his or her job. See, e.g., Goodman v. Boeing Co., 127 Wn.2d 401, 408–409, 899 P.2d 1265 (1995) (a reasonable accommodation envisions an exchange between employer and employee, where each party seeks and shares information to achieve the best match between the employee's capabilities and available positions); Dean, 104 Wn.2d at 637–38 ("It was correspondingly the duty of [the employee] to cooperate with the employer in the hunt for other suitable work by making the employer aware of his qualifications, by applying for all jobs which might fit his abilities, and by accepting reasonably compensatory work he could perform."). See also Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1116 (9th Cir. 2000) (en banc), vacated on other grounds, 535 U.S. 391, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002), wherein the court held that "employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible." *Barnett* also notes:

> The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees. The shared goal is to identify an accommodation that allows the employee to perform the job effectively. Both sides must communicate directly, exchange essential information and neither side can delay or obstruct the process.

Barnett, 228 F.3d at 1114–15; see also Frisino, 160 Wn.App. at 781 (addressing the importance of "a good faith *Goodman* interactive process" in developing a reasonable accommodation for a disabled employee).

A requested accommodation to transfer to a different supervisor is considered unreasonable as a matter of law. See Snyder v. Med. Servs. Corp. of E. Wash., 145 Wn.2d 233, 35 P.3d 1158 (2000); see also RCW 49.60.040(7)(d); Comment to WPI 330.33 (Employment Discrimination—Disability Discrimination—Reasonable Accommodation—Burden of Proof).

An employer's duty to reasonably accommodate may include modify-

ing or eliminating *non-essential* job functions, or providing a reasonable accommodation to allow the employee to perform essential job functions, such as by providing access to facilities or modifying work schedules. Davis, 149 Wn.2d at 534–35; Fey v. State, 174 Wn.App. 435, 452, 300 P.3d 435 (2013). An employer does not have to modify or eliminate essential functions. Frisino, 160 Wn.App. at 778 (citing Pulcino v. Fed. Express Corp., 141 Wn.2d 629, 644, 9 P.3d 787 (2000)); see also Harrell v. Dep't of Soc. Health Servs., 170 Wn.App. 386, 398, 285 P.3d 159 (2012).

[Current as of November 2020.]

WPI 330.36

EMPLOYMENT DISCRIMINATION—DISABILITY DISCRIMINATION—UNDUE HARDSHIP—BURDEN OF PROOF

An employer is not required to accommodate an employee's disability if it would impose an undue hardship on the operation of the employer's business. (Name of defendant) has the burden of proving that an accommodation would impose an undue hardship on (name of defendant).

An accommodation is an undue hardship if the cost or difficulty is unreasonable, considering[:]

(1) The size of and the resources available to the employer[;]

[(2) Whether the cost can be included in planned remodeling or maintenance;] [and]

[(3)] [The requirements of contracts].

If you decide that (name of employer) has proven its undue hardship defense as to each accommodation, then your verdict should be for (name of employer) on this claim.

NOTE ON USE

Under certain circumstances, non-cost factors also may support an undue hardship instruction. This instruction should be modified as necessary under such circumstances.

Use a special verdict form to guide the jury to decide first whether Plaintiff has met [pronoun] burden to prove failure to accommodate and only if Plaintiff has met that burden should the jury consider undue hardship.

If the restrictions of other laws or regulations are a part of the employer's argument about undue hardship, the jury should be specifically instructed as to the requirements of the other laws at issue. The instruction likewise will need to be modified to address any "other appropriate considerations" that might apply to a given case.

Use this instruction with WPI 330.34 (Employment Discrimination—Disability Discrimination—Reasonable Accommodation—Definition).

COMMENT

This instruction was modified for this edition to instruct the jury regarding its verdict if the defendant has proven its undue hardship defense as to each accommodation.

Failure to give this instruction may be error if there is an issue of reasonableness of accommodation or undue hardship. Erwin v. Roundup Corp., 110 Wn.App. 308, 40 P.3d 675 (2002). *Erwin* implicitly approved the former version of this instruction.

Jurors may be confused if the court fails to inform them that the defendant must prove that a proposed accommodation would be an undue hardship. Easley v. Sea-Land Serv., Inc., 99 Wn.App. 459, 471–72, 994 P.2d 271 (2000); Griffith v. Boise Cascade, Inc., 111 Wn.App. 436, 442–43, 45 P.3d 589 (2002) (an accommodation may be an undue burden on the defendant and therefore unreasonable); see also Wheeler v. Catholic Archdiocese of Seattle, 65 Wn.App. 552, 829 P.2d 196 (1992), reversed on other grounds, 124 Wn.2d 634, 880 P.2d 29 (1994).

If the employer has provided an accommodation to an employee, then the correct focus is whether the accommodation was reasonable. The employer is not required to further show that each of the employee's alternative accommodations would result in undue hardship. Sharpe v. Am. Tel. & Tel. Co., 66 F.3d 1045 (9th Cir. 1995).

> [T]he extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.
>
> . . .
>
> [T]o hold otherwise would contravene clear law established by Washington courts that '[the antidiscrimination] Act does not require an employer to offer the employee the precise accommodation he or she requests.'

Sharpe, 66 F.3d at 1050 (citations omitted); see also Doe v. Boeing Co., 121 Wn.2d 8, 846 P.2d 531 (1993).

[Current as of January 2021.]

WPI 330.37

EMPLOYMENT DISCRIMINATION—ESSENTIAL FUNCTION—DEFINITION

An essential function is a job duty that is fundamental, basic, necessary and indispensable to filling a particular position, as opposed to a marginal duty divorced from the essence or substance of the job.

In determining whether a function is essential to a position, you may consider, among others, the following factors:

(1) The function may be essential because the reason the position exists is to perform that function;

(2) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(3) The function may be highly specialized so that the employee in the position is hired for his or her expertise or ability to perform the particular function.

Evidence of whether a particular function is essential includes, but is not limited to:

(1) The employer's judgment as to which functions are essential;

(2) Written job descriptions prepared before advertising or interviewing applicants for the job;

(3) The amount of time spent on the job performing the function;

(4) The consequences of not requiring the employee to perform the function;

(5) The terms of a collective bargaining agreement;

(6) The work experience of past employees in the job; and/or

(7) The current work experience of employees in similar jobs.

NOTE ON USE

This definition should be used whenever there is an issue as to whether a function of the position is essential. This issue is most likely to arise in accommodation cases. This instruction is designed to be used together with WPI 330.34 (Disability Discrimination—Reasonable Accommodation—Definition). In appropriate cases, also use WPI 330.36 (Employment Discrimination—Disability Discrimination—Undue Hardship—Burden of Proof) or WPI 330.04 (Employment Discrimination—Bona Fide Occupational Qualification (BFOQ)). See Comment below regarding use of BFOQ instruction in discharge cases.

COMMENT

This instruction was modified for this edition to include criteria from 29 CFR § 1630.2(n)(3) (2012) for determining the existence of an "essential job function," because "Washington courts have adopted the definition promulgated by the United States Equal Employment Opportunity Commission when interpreting the Americans with Disabilities Act of 1990 (ADA). . . ." Kries v. WA-SPOK Primary Care, LLC, 190 Wn.App. 98, 124–25, 362 P.3d 974 (2015). See discussion below.

"The term essential functions means the *fundamental job duties* of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the *marginal* functions of the position." Davis v. Microsoft Corp., 149 Wn.2d at 533 (quoting 29 C.F.R. § 630.2(n)(1) (2002)) (emphasis in original). Job presence or attendance may be an essential job function. Davis, 149 Wn.2d at 534.

The term "essential job function" is not found in RCW 49.60.180, so "Washington courts have adopted the definition promulgated by the United States Equal Employment Opportunity Commission when

interpreting the Americans with Disabilities Act of 1990 (ADA). . . ." Kries, 190 Wn.App. at 124–25 (citing federal cases). "Washington courts have in fact drawn on the federal definition to instruct juries on the meaning of 'essential functions.' " Davis, 149 Wn.2d at 533 (citing Herring v. Dep't of Soc. & Health Servs., 81 Wn.App. 1, 27 n.12, 914 P.2d 67 (1996); Easley v. Sea-Land Serv., Inc., 99 Wn.App. 459, 472 n.3, 994 P.2d 271 (2000)). The factors and evidence referenced in this instruction are taken from the EEOC's definition at 29 C.F.R. § 1630.2 (2012).

The court in Kries v. WA-SPOK Primary Care, LLC, 190 Wn.App. 98, 123–126, 362 P.3d 974 (2015), noted the distinction between "essential functions of a job" and "qualification standards" for a position as articulated in Bates v. United Parcel Services, Inc., 511 F.3d 974 (9th Cir. 2007) (addressing claims brought under the ADA). Essential functions are basic duties. Qualification standards include personal and professional attributes that may include physical, medical, and safety requirements. In drawing this distinction, the *Bates* court relied on definitions of the terms, under ADA regulations, found respectively in 29 C.F.R. § 1630.2(n)(1) and § 1630.2(q). A qualification standard applies to a person with a disability who applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability.

> Washington law is well settled that to prove a claim for failure to accommodate, a plaintiff must demonstrate that he or she can perform the essential functions of the job as determined and applied by the employer—not that the employer could revamp the essential functions of a job to fit the employee.

Fey v. State, 174 Wn.App. 435, 452, 300 P.3d 435 (2013).

[Current as of November 2020.]

WPI 330.40

EMPLOYMENT DISCRIMINATION—DISCRIMINATION BASED ON RELIGION OR CREED—FAILURE TO ACCOMMODATE—DEFINITION

An employer has a duty to provide a reasonable accommodation to an employee if that employee has a need for such an accommodation based upon a bona fide religious belief, creed, practice or observance, unless the accommodation would impose an undue hardship on the employer.

There may be more than one reasonable accommodation for a religious belief, creed, practice or observance. The accommodation need not be the precise accommodation the employee requests, as long as the accommodation provided is effective.

NOTE ON USE

Use this instruction with WPI 330.41 (Employment Discrimination—Discrimination Based on Religion and Creed—Reasonable Accommodation—Burden of Proof) and, when appropriate, WPI 330.42 (Employment Discrimination—Discrimination Based on Religion and Creed—Failure to Accommodate—Defense of Undue Hardship—Burden of Proof).

COMMENT

RCW Chapter 49.60.

This instruction was modified for this edition to include the term "creed," which is used in the statute. This instruction is based on Kumar v. Gate Gourmet, Inc., 180 Wn.2d 481, 325 P.3d 193 (2014), in which the Washington Supreme Court expressly recognized a cause of action for failing to accommodate an employee's religious practices. The Washington Supreme Court also recognized both a disparate treatment and disparate impact cause of action. Kumar, 180 Wn.2d at 498–99. According to the *Kumar* court, the term "creed" in the Washington Law Against Discrimination (WLAD) refers to religious belief. Kumar, 180 Wn.2d at 489.

The second paragraph of the instruction states Washington law with respect to accommodations of disabilities, which the *Kumar* court cited with approval regarding religious accommodation. Kumar, 180 Wn.2d at 501–03.

In contrast to the instruction on disability discrimination and accommodation, this instruction does not list possible forms of reasonable accommodation. *Kumar* is the only Washington case to provide guidance. However, in interpreting the Washington Law Against Discrimination, the *Kumar* court looked at cases applying Title VII's prohibition against religious discrimination.

The EEOC guidance on religious discrimination, 29 CFR § 1605.2, lists specific examples of possible accommodations, including adjustments to work schedules, flexible scheduling of arrival and departure times, breaks and lunch time, voluntary substitutes and "swaps," and lateral transfers. Other potential forms of accommodation identified by the Commission include exceptions to dress and grooming rules, use of the work facility for a religious observance, and accommodating prayer, proselytizing, and other forms of religious expression.

[Current as of October 2020.]

WPI 330.41

EMPLOYMENT DISCRIMINATION—DISCRIMINATION BASED ON RELIGION OR CREED—REASONABLE ACCOMMODATION—BURDEN OF PROOF

Discrimination in employment on the basis of religion or creed is prohibited. One form of unlawful discrimination is a failure to reasonably accommodate an employee's bona fide religious belief, creed, practice or observance.

To establish [his] [her] claim of discrimination on the basis of failure to reasonably accommodate a religious belief, creed, practice or observance, (name of plaintiff) has the burden of proving each of the following elements:

(1) That (name of plaintiff) had a bona fide religious belief or creed, the practice or observance of which conflicted with employment duties;

(2) That (name of plaintiff) either informed (name of employer) of the belief, creed, practice or observance and the conflict, or (name of employer) was on notice of the belief, creed, practice or observance and the conflict; and

(3) That (name of employer) responded by subjecting [him] [her] to threatened or actual discriminatory treatment.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if any of these propositions have not been proved, your verdict should be for (name of employer) [on this claim].

NOTE ON USE

Use this instruction with WPI 330.40 (Employment Discrimination—Discrimination Based on Religion or Creed—Reasonable Accommodation—Definition) and, when appropriate, WPI 330.42 (Employment Discrimination—Discrimination Based on Religion or Creed—Failure to Accommodate—Defense of Undue Hardship—Burden of Proof). Use the appropriate bracketed language depending on whether the jury will be instructed on an undue hardship defense.

This instruction may need to be modified or a separate instruction created if the employer asserts as a defense that it offered the employee a reasonable accommodation. See Kumar v. Gate Gourmet, Inc., 180 Wn.2d 481, 325 P.3d 193 (2014).

COMMENT

RCW Chapter 49.60.

This instruction was modified for this edition to include the term "creed," which is used in the statute. The instruction is derived from Kumar v Gate Gourmet, Inc., 180 Wn.2d 481, 501–02, 325 P.3d 193 (2014). With respect to the second element, the phrase "or the employer was on notice . . ." is included to incorporate the court's holdings that with respect to disability accommodation, the employee is not required under the Washington Law Against Discrimination to request an accommodation. Rather, the employer's duty is triggered by the employer being on notice of a disability and its accompanying limitations. Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 145, 94 P.3d 930 (2004); Hill v. BTCI Income Fund I, 144 Wn.2d 172, 193, 23 P.3d 440 (2001).

[Current as of October 2020.]

WPI 330.42

EMPLOYMENT DISCRIMINATION—DISCRIMINATION BASED ON RELIGION OR CREED—FAILURE TO ACCOMMODATE—DEFENSE OF UNDUE HARDSHIP—BURDEN OF PROOF

(Name of employer) is not obligated to accommodate (name of employee)'s religious [belief/observance/practice] if providing such accommodation would cause undue hardship to (name of employer)'s business. (Name of employer) has the burden of proving its undue hardship defense.

An accommodation causes an "undue hardship" when it would have more than an insignificant effect on the business.

If you decide that (name of employer) has proven its undue hardship defense as to each accommodation, then your verdict should be for (name of employer) on this claim.

NOTE ON USE

Use with WPI 330.40 (Employment Discrimination—Religious Discrimination based on Failure to Accommodate—Definition) and WPI 330.41 (Employment Discrimination—Discrimination Based on Religion and Creed—Reasonable Accommodation—Burden of Proof) when appropriate.

COMMENT

This instruction was modified for this edition to clarify the burden of proof.

In Kumar v. Gate Gourmet, Inc., 180 Wn.2d 481, 325 P.3d 193 (2014), the Washington Supreme Court recognized the claim of failure to accommodate a religious practice, subject to the defense that the employer either offered the employee a reasonable accommodation or that doing so would have caused it an "undue hardship." This defense arises under a 1972 amendment to Title VII expressly articulating the reasonable accommodation rule, which had previously been derived from EEOC regulations. 42 U.S.C. § 2000e(j). The term undue hardship was left undefined.

In 1977, the United States Supreme Court held that an undue hardship results whenever an accommodation requires an employer "to bear more than a *de minimis* cost." Kumar, 180 Wn.2d at 502 (quoting Trans World Airlines, Inc. v Hardison, 432 U.S. 63, 84, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977)). The *Kumar* court added:

> And other courts have held that an undue hardship may be something other than a financial burden. An employer can defeat a religious accommodation claim by showing that valid concerns other than money—e.g., legal obligations or the interests of clients or other employees—would be unduly burdened by an accommodation.

Kumar, 180 Wn.2d at 502. But see Tamosaitis v. URS Inc., 781 F.3d 468, 482–83 (9th Cir. 2015) (deference to a customer's discriminatory preference is itself discriminatory).

The definition of "undue hardship" is based on the extensive EEOC regulations and guidance interpreting and exploring the boundaries of undue hardship and "*de minimis*" cost with respect to religious discrimination. EEOC Compliance Manual, Number 915.003, Section 12-IV (B and C) (2008). Relevant portions of the EEOC Compliance Manual discussion regarding undue hardship is paraphrased from EEOC Compliance Manual, Number 915.003, Section 12-IV (B).

Whether a proposed accommodation imposes an undue hardship turns on the particular factual context of each case. Relevant factors may include the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation.

An employer cannot rely on potential or hypothetical hardship when faced with a religious obligation.

The employer must also demonstrate that the accommodation would require more than *de minimis* cost. Factors to be considered are the identifiable cost in relation to the size and operating costs of the employer, and the number of individuals who will in fact need a particular accommodation. Generally, the payment of administrative costs necessary for an accommodation will not constitute more than *de minimis* cost, whereas the regular payment of premium wages or the hiring of additional employees to provide an accommodation will generally cause an undue hardship to the employer.

Costs to be considered include not only direct monetary costs but also the burden on the conduct of the employer's business. Whether the

proposed accommodation conflicts with another law will also be considered. See also the Washington State Human Rights Commission *Guide to Religion and Washington State Non-Discrimination Laws*, pages 3–4, updated July 2015.

[Current as of March 2021.]

WPI 330.44

EMPLOYMENT DISCRIMINATION—PREGNANCY DISCRIMINATION—DEFINITION

It is an unfair practice for any employer to:

(1) Fail or refuse to make reasonable accommodation for an employee for pregnancy, unless the employer can demonstrate that doing so would impose an undue hardship on the employer's program, enterprise, or business;

(2) Take adverse action that affects the terms, conditions, or privileges of employment against an employee who requests, declines, or uses an accommodation;

(3) Deny employment opportunities to an otherwise qualified employee if such denial is based on the employer's need to make reasonable accommodation; or

(4) Require an employee to take leave if another reasonable accommodation can be provided for the employee's pregnancy.

"Pregnancy" includes the employee's pregnancy and pregnancy-related health conditions, including the need to express breast milk.

NOTE ON USE

Use this instruction with WPI 330.45 (Employment Discrimination—Pregnancy Discrimination—Reasonable Accommodation—Burden of Proof).

COMMENT

This instruction is new for this edition.

This instruction is derived from RCW 43.10.005(1)(b), (2), and (6).

[Current as of November 2020.]

WPI 330.45

EMPLOYMENT DISCRIMINATION—PREGNANCY DISCRIMINATION—REASONABLE ACCOMMODATION—BURDEN OF PROOF

Discrimination in employment on the basis of pregnancy is prohibited. One form of unlawful discrimination is a failure to reasonably accommodate an employee's pregnancy.

To establish her claim of discrimination on the basis of failure to reasonably accommodate pregnancy, (name of plaintiff) has the burden of proving each of the following propositions:

(1) That she was pregnant or had a pregnancy-related health condition;

(2) That either

(a) the employee requested from her employer a reasonable accommodation for her pregnancy or her pregnancy-related health condition; or

(b) no notice of a request was required because the employer knew about or suspected the employee's need for reasonable accommodation for her pregnancy or her pregnancy-related health condition; and

(3) That the employer failed to reasonably accommodate the employee's pregnancy or pregnancy-related health condition.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff [on this claim]. On the other hand, if any of these propositions has not

been proved, your verdict should be for the employer [on this claim].

NOTE ON USE

Use this instruction with WPI 330.44 (Employment Discrimination—Pregnancy Discrimination—Definition), WPI 330.46 (Employment Discrimination—Pregnancy Discrimination—Reasonable Accommodation—Definition), and as appropriate, WPI 330.48 (Employment Discrimination—Pregnancy Discrimination—Undue Hardship).

COMMENT

This instruction is new for this edition.

RCW 43.10.005 was enacted in 2017.

[Current as of November 2020.]

WPI 330.46

EMPLOYMENT DISCRIMINATION—PREGNANCY DISCRIMINATION—REASONABLE ACCOMMODATION—DEFINITION

"Reasonable accommodation" means:

[(1)] [Providing more frequent, longer, or flexible restroom breaks;]

[(2)] [Modifying a no food or drink policy;]

[(3)] [Job restructuring, part-time or modified work schedules, reassignment to a vacant position, or acquiring or modifying equipment, devices, or an employee's work station;]

[(4)] [Providing seating or allowing the employee to sit more frequently if her job requires her to stand;]

[(5)] [Providing for a temporary transfer to a less strenuous or less hazardous position;]

[(6)] [Providing assistance with manual labor and limits on lifting;]

[(7)] [Scheduling flexibility for prenatal visits;]

[(8)] [Providing reasonable break time for an employee to express breast milk for two years after the child's birth each time the employee has need to express the milk and providing a private location, other than a bathroom, if such a location exists at the place of business or worksite, which may be used by the employee to express breast milk. If the business location does not have a space for the employee to express milk, the employer shall work with the employee to

identify a convenient location and work schedule to accommodate the employee's needs;] [and]

[(9)] [Any further pregnancy accommodation an employee may request, and to which an employer must give reasonable consideration in consultation with information provided on pregnancy accommodation by the Department of Labor and Industries or the attending health care provider of the employee].

NOTE ON USE

The bracketed paragraphs are to be used in an appropriate case when there is an issue as to which of several accommodations might be considered reasonable, or when multiple modes of accommodation are attempted.

The list of accommodations in the instructions is not exclusive.

Use this instruction with WPI 330.44 (Employment Discrimination—Pregnancy Discrimination—Definition), WPI 330.45 (Employment Discrimination—Pregnancy Discrimination—Reasonable Accommodation—Burden of Proof), and as appropriate, WPI 330.47 (Employment Discrimination—Pregnancy Discrimination —Certain Reasonable Accommodations Required) and WPI 330.48 (Employment Discrimination—Pregnancy Discrimination—Undue Hardship).

COMMENT

This instruction is new for this edition.

This instruction is derived from RCW 43.10.005.

An employer may not require an employee to provide a written certification from her treating health care professional regarding the need for the following accommodations: (i) providing more frequent, longer, or flexible restroom breaks; (ii) modifying a no food or drink policy; (iii) providing seating or allowing the employee to sit more frequently if her job requires her to stand; (iv) providing reasonable break time for an employee to express breast milk; or (v); limits on lifting over seventeen pounds. RCW 43.10.005.

[Current as of March 2021.]

WPI 330.47

EMPLOYMENT DISCRIMINATION—PREGNANCY DISCRIMINATION—CERTAIN REASONABLE ACCOMMODATIONS REQUIRED

Upon request or notice of the need for such accommodation, an employer must provide the following accommodations for an employee who is pregnant or has a pregnancy-related health condition:

[(1)] [Providing more frequent, longer, or flexible restroom breaks] [and]

[(2)] [Modifying a no food or drink policy] [and]

[(3)] [Providing seating or allowing the employee to sit more frequently if her job requires her to stand] [and]

[(4)] [Imposing limits on lifting over 17 pounds].

An employer cannot refuse to provide these accommodations, claim an undue hardship, or require that the employee provide written certification from her health care provider regarding the need for these accommodations.

NOTE ON USE

Use this instruction with WPI 330.44 (Employment Discrimination—Pregnancy Discrimination—Definition) and WPI 330.45 (Employment Discrimination—Pregnancy Discrimination—Reasonable Accommodation—Burden of Proof) when one of the required accommodations is at issue.

COMMENT

This instruction is new for this edition.

This instruction is derived from RCW 43.10.005.

[Current as of January 2021.]

WPI 330.48

EMPLOYMENT DISCRIMINATION—PREGNANCY DISCRIMINATION—UNDUE HARDSHIP

An employer is not required to accommodate an employee's pregnancy or pregnancy-related condition by affording certain types of accommodations if doing so would impose an undue hardship on the operation of the employer's business. "Undue hardship" means an action requiring significant difficulty or expense.

(Name of defendant) has the burden of proving that any of the following accommodations would impose an undue hardship on (name of defendant):

[(1)] [Job restructuring, part-time or modified work schedules, reassignment to a vacant position, or acquiring or modifying equipment, devices, or an employee's work station]

[(2)] [Providing for a temporary transfer to a less strenuous or less hazardous position]

[(3)] [Providing assistance with manual labor and limits on lifting less than seventeen pounds]

[(4)] [Scheduling flexibility for prenatal visits] [or]

[(5)] [Any further pregnancy accommodation the employee requested, in consultation with information provided on pregnancy accommodation by the Department of Labor and Industries or the attending health care provider of the employee].

An employer may request that the employee provide written certification from her treating health care professional regarding the need for the above accommodations.

[To accommodate the employee, an employer is not

required to discharge any other employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job, unless the employer does so or would do so to accommodate other classes of employees who need accommodation.]

[An employer is not required to create additional employment that the employer would not otherwise have created, unless the employer does so or would do so for other classes of employees who need accommodation.]

NOTE ON USE

When any of the express accommodations listed in RCW 43.10.005 (c)(i)–(v) are at issue, use WPI 330.47 (Employment Discrimination—Pregnancy Discrimination—Certain Reasonable Accommodations Required).

Under certain circumstances, non-cost factors also may support an undue hardship instruction. This instruction should be modified as necessary under such circumstances.

This instruction is designed to be used together with WPI 330.44 (Employment Discrimination—Pregnancy Discrimination—Definition), WPI 330.46 (Employment Discrimination—Pregnancy Discrimination—Reasonable Accommodation—Definition), and WPI 330.45 (Employment Discrimination—Pregnancy Discrimination—Reasonable Accommodation—Burden of Proof).

COMMENT

This instruction is new for this edition.

This instruction is derived from RCW 43.10.005. An employer may not claim undue hardship or request written certification from a health care professional regarding the need for the following accommodations:

(i) Providing more frequent, longer, or flexible restroom breaks;

(ii) Modifying a no food or drink policy;

(iii) Providing seating or allowing the employee to sit more frequently if her job requires her to stand

(iv) Providing reasonable break time for an employee to express breast milk; or

(v) limits on lifting over seventeen pounds.

RCW 43.10.005(c)(i)–(v).

The phrase "additional employment" in the final paragraph of the instruction is not yet defined by state or case law. Additional instruction may be required.

[Current as of March 2021.]

WPI 330.49

EMPLOYMENT DISCRIMINATION—RETALIATION RELATED TO PREGNANCY ACCOMMODATION

It is unlawful for an employer to retaliate by

(A) Taking adverse action against an employee who requests, declines, or uses an accommodation that affects the terms, conditions, or privileges of employment; or

(B) Denying employment opportunities to an otherwise qualified employee if such denial is based on the employer's need to make reasonable accommodation.

To establish a claim of unlawful retaliation by (name of employer), (name of plaintiff) has the burden of proving both of the following:

(1) [That (name of employer) took adverse action against (name of plaintiff)] [That (name of employer) denied employment opportunities to (name of employee) who was an otherwise qualified employee]; and

(2) That a substantial factor in the decision to [discipline] [demote] [deny the promotion] [terminate] [deny employment opportunities to] was (name of plaintiff) [requesting, declining, or using an accommodation] [the employer's need to make reasonable accommodation].

If you find from your consideration of all of the evidence that both of these propositions have been proved, then your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if any one of these propositions has not been proved, your verdict should be for (name of defendant) [on this claim].

(Name of plaintiff) does not have to prove that [requesting, declining, or using an accommodation] [the employer's need to make reasonable accommodation] [was] [were] the only factor or the main factor in (name of defendant)'s decision, nor does (name of plaintiff) have to prove that [he] [she] would not have been [disciplined] [demoted] [denied the promotion] [terminated] [denied employment opportunities] but for [his] [her] [opposition] [participation].

NOTE ON USE

Use the bracketed phrases as appropriate. If supported by the evidence, it may be appropriate to substitute other allegedly retaliatory acts.

Use this instruction with WPI 330.06 (Employment Discrimination—Retaliation—Adverse Employment Action—Definition). If the alleged retaliation is for opposition or participation activity, use instruction WPI 330.05 (Employment Discrimination—Retaliation).

COMMENT

This instruction is new for this edition.

The elements are based upon on a new statute, RCW 43.10.005, which creates protections for employees regarding pregnancy and pregnancy-related reasonable accommodations.

An adverse employment action will support an award of damages when "(1) [the employee] engaged in a statutorily protected activity, (2) the employer took an adverse employment action against the employee, and (3) there is a causal connection between the employee's activity and the employer's adverse action." Boyd v. State, 187 Wn.App. 1, 11–12, 349 P.3d 864 (2015) (citing Estevez v. Faculty Club of Univ. of Wash., 129 Wn.App. 774, 120 P.3d 579 (2005)); see also Davis v. West One Auto. Grp., 140 Wn.App. 449, 166 P.3d 807 (2007); Coville v. Cobarc Servs., Inc., 73 Wn.App. 433, 869 P.2d 1103 (1994) (adding the term "opposition").

Adverse employment action. Adverse employment actions involve a change in employment that is more than an inconvenience or alteration of one's job responsibilities. Boyd, 187 Wn.App. 1. The distinction between an adverse employment action and a mere "inconvenience" or "alterations of one's job responsibilities" is not a bright line. See Alonso v. Qwest Commc'ns Co., LLC, 178 Wn.App. 734, 747, 315 P.3d

610 (2013) (whether loss of certain van and cellular phone benefits constituted adverse employment action is an issue of fact for the jury). Adverse employment actions may include: failure to promote, Davis v. Dep't of Lab. & Indus., 94 Wn.2d 119, 615 P.2d 1279 (1980); reduction of pay, Kirby v. City of Tacoma, 124 Wn.App. 454, 98 P.3d 827 (2004); demotion or transfer, Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.3d 611 (2002); and poor performance rating preventing rehiring, Cornwell v. Microsoft Corp., 192 Wn.2d 403, 430 P.3d 229 (2018).

An adverse employment action is one that would "dissuad[e] a reasonable worker from making or supporting a charge of discrimination." Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006); see the Note on Use for WPI 330.06 (Employment Discrimination—Retaliation—Adverse Employment Action—Definition).

Substantial factor. An individual asserting a claim under this provision must prove a retaliatory motive was a "substantial factor" in the challenged decision, but need not prove it was the only factor or a "determining factor." Allison v. Housing Auth., 118 Wn.2d 79, 821 P.2d 34 (1991). Complaints about the conduct of a supervisor that do not allege discrimination are insufficient to impute knowledge of protected opposition to employer. Graves v. Dep't of Game, 76 Wn.App. 705, 712, 887 P.2d 424 (1994) (citing Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 69, 821 P.2d 18 (1991)).

[Current as of November 2020.]

WPI 330.50

EMPLOYMENT DISCRIMINATION—WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY

It is unlawful to terminate an employee [for refusing to commit an unlawful act] [for performing a public duty] [for exercising a legal right or privilege] [in retaliation for reporting employer misconduct].

NOTE ON USE

Use this instruction when a plaintiff claims that a public policy was involved in a termination from employment. If the plaintiff's claim does not fall within one of the bracketed scenarios, a different instruction consistent with Gardner v. Loomis Armored, Inc. 128 Wn.2d 931, 941, 913 P.2d 377 (1996), may need to be drafted.

COMMENT

Three decisions of the Washington Supreme Court altered the Washington common law tort of wrongful termination in violation of a public policy: Becker v. Community Health Systems, 184 Wn.2d 252, 359 P.3d 746 (2015), Rose v. Anderson Hay & Grain Co., 184 Wn.2d 268, 358 P.3d 1159 (2015), and Rickman v. Premera Blue Cross, 184 Wn.2d 300, 358 P.3d 1153 (2015). These decisions effectively overruled Cudney v. ALSCO, Inc., 172 Wn.2d 524, 259 P.3d 244 (2011). Because of these cases, the focus of the claim is now on whether the employee is engaging in an activity protected by public policy and not whether there are alternate means of protecting or advancing the public policy at issue.

To support a claim, the termination may be direct, by an employer, or it may be constructive, when the employee believes it necessary to resign. Becker, 184 Wn.2d at 257. For the latter circumstance, see WPI 330.52 (Employment Discrimination—Constructive Discharge—Burden of Proof).

Whether a public policy is involved is a question of law to be decided by a court. Hubbard v. Spokane Cnty., 146 Wn.2d 699, 708, 50 P.3d 602 (2002), overruled on other grounds by Rose, 184 Wn.2d at 278–286.

[Current as of October 2020.]

WPI 330.51

EMPLOYMENT DISCRIMINATION—WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY—BURDEN OF PROOF

To recover on [his] [her] claim of wrongful termination in violation of public policy, (name of plaintiff) has the burden of proving that a substantial factor motivating the employer to terminate [his] [her] employment was [his] [her] [refusing to commit an unlawful act] [performing a public duty] [exercising a legal right or privilege] [reporting what [he] [she] reasonably believed to be employer misconduct].

If you find from your consideration of all of the evidence that (name of plaintiff) has not met this burden, then you must find for the defendant (name of employer) [on this claim].

If you find from your consideration of all of the evidence that (name of plaintiff) has met this burden, then you must find for plaintiff (name of plaintiff) [on this claim].

NOTE ON USE

Use this instruction when the plaintiff alleges a termination in violation of one of the four categories of wrongful discharge in violation of public policy listed in the first paragraph of the instruction.

This instruction sets out the issues a jury must decide for a claim of wrongful termination in violation of public policy. See Comment below regarding the employer's "overriding justification" defense.

For a claim of constructive discharge in violation of public policy, the jury should also be instructed on the four elements of a constructive discharge claim in WPI 330.52 (Employment Discrimination—Constructive Discharge—Burden of Proof). Peiffer v. Pro-Cut Concrete Cutting and Breaking Inc., 6 Wn.App.2d 803, 830, 431 P.3d 1018 (2018).

COMMENT

This instruction is based on Becker v. Community Health Systems, 184 Wn.2d 252, 359 P.3d 746 (2015), Rose v. Anderson Hay & Grain Co., 184 Wn.2d 268, 358 P.3d 1159 (2015), and Rickman v. Premera Blue

Cross, 184 Wn.2d 300, 358 P.3d 1153 (2015). The three decisions effectively overruled Cudney v. ALSCO, Inc., 172 Wn.2d 524, 259 P.3d 244 (2011), which had required a plaintiff to prove that bringing a tort action was strictly necessary to vindicate the public policy at issue. Rickman, 184 Wn.2d at 310.

The "substantial factor" test applies to the causation element of a claim for wrongful termination in violation of public policy. Rickman, 184 Wn.2d at 314. See also RCW Chapter 49.60; WPI 330.01 (Employment Discrimination—General—Disparate Treatment—Burden of Proof); WPI 330.01.01 (Employment Discrimination—General—Disparate Treatment—Burden of Proof—Substantial Factor).

To support a claim, the termination may be direct, by an employer, or it may be constructive, when the employee believes it necessary to resign. Korslund v. DynCorp Tri-Cities Servs. Inc., 156 Wn.2d 168, 177 n.1, 125 P.3d 119 (2005).

In Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 936, 913 P.2d 377 (1996), the Court adopted a four-part framework based on a treatise written by Henry Perritt known as "the Perritt framework." It has clarified that "the Perritt framework should not be applied to a claim that falls within one of the four categories of wrongful discharge in violation of a public policy." Martin v. Gonzaga Univ., 191 Wn.2d 712, 723–24, 425 P.3d 837 (2018) (quoting Becker v. Cmty. Health Sys. Inc., 184 Wn.2d 252, 258-59, 359 P.3d 746 (2015)). The four categories are listed in the first paragraph of this jury instruction.

In cases that do not fall within one of the four categories of wrongful discharge listed in the first paragraph of the instruction, and the employee relies on the Perritt framework to establish liability, the employer may assert an "overriding justification defense" to the wrongful discharge claim. In such cases, "[i]f 'the employer has an overriding reason for terminating the employee despite the employee's public-policy-linked conduct,' then it cannot be held liable." Martin, 191 Wn.2d at 728 (quoting Gardner, 128 Wn.2d at 947). "Once a plaintiff presents a prima facie case of wrongful discharge in violation of public policy, the burden of proof shifts to the employer to show the termination was justified by an overriding consideration." Martin, 191 Wn.2d at 728 (quoting Rickman, 184 Wn.2d at 314). The Supreme Court has not addressed the jury's role in making this determination.

The version of WPI 330.51 published in the 2017–2018 Supplement to 6A Washington Practice, Washington Pattern Jury Instructions: Civil (6th ed.) included the following paragraph:

[If you find from your consideration of all of the evidence that (name

of plaintiff) has met this burden, then you must determine whether (name of employer) has met its burden of proving that it had an overriding justification for terminating (name of plaintiff). If you find that (name of employer) has met its burden of proving it had an overriding justification for its actions, then you must find for (name of employer). If (name of employer) has not met this burden, then you must find for (name of plaintiff) [on this claim].]

In Martin v. Gonzaga University, 200 Wn.App. 332, 402 P.3d 294 (2017), affirmed on other grounds, 191 Wn.2d 712, 425 P.2d 837 (2018), Judge Fearing suggested that the sufficiency of an employer's justification for termination is a question of law for the trial court and not for a jury to decide. Martin, 200 Wn.App. at 369. The Washington Supreme Court has yet to decide that issue.

Until the Supreme Court clarifies this issue, if the trial court determines that the jury should decide whether the employer has met its burden of proving that it had an overriding justification for terminating the plaintiff, an appropriate instruction will need to be drafted.

[Current as of October 2020.]

WPI 330.52

EMPLOYMENT DISCRIMINATION—CONSTRUCTIVE DISCHARGE—BURDEN OF PROOF

Constructive discharge occurs when an employer deliberately creates working conditions so intolerable that a reasonable person in the shoes of the employee would feel compelled to [resign] [retire].

To establish constructive discharge, (name of plaintiff) must prove the following:

1. **That the defendant deliberately made working conditions intolerable for [him] [her];**

2. **That a reasonable person in [his] [her] position would be forced to [resign] [retire];**

3. **That [he] [she] [resigned] [retired] because of the conditions and not for any other reason; and**

4. **That [he] [she] suffered damage as a result of being forced to [resign] [retire].**

NOTE ON USE

This instruction sets forth the elements of a claim of constructive discharge and can be used when a plaintiff was not expressly terminated from employment but claims that he or she was forced to resign or retire because the defendant/employer made working conditions intolerable. This instruction may be used in any claim asserting a wrongful termination through constructive discharge; but see the Comment below regarding Martini v. Boeing, 137 Wn.2d 357, 367, 971 P.2d 45 (1999), in which the Supreme Court held that a plaintiff alleging disability discrimination under the Washington Law Against Discrimination (WLAD) is not required to establish constructive discharge to recover lost wages.

For a claim of constructive discharge in violation of public policy, the jury should be instructed on the four elements of this constructive discharge claim and the elements of WPI 330.51 (Employment

Discrimination—Wrongful Termination in Violation of Public Policy—Burden of Proof). Peiffer v. Pro-Cut Concrete Cutting & Breaking Inc., 6 Wn.App.2d 803, 830, 431 P.3d 1018 (2018).

COMMENT

This instruction is based on the Court of Appeals decision in Barnett v. Sequim Valley Ranch, LLC, 174 Wn.App. 475, 489, 302 P.3d 500 (2013), stating "[N]umerous Washington cases establish that these four elements are necessary for a wrongful constructive discharge claim." See, e.g., Haubry v. Snow, 106 Wn.App. 666, 31 P.3d 1186 (2001), in which the court explained that an employee:

> must prove that [her employer] deliberately made working conditions intolerable for her; that a "reasonable person in her position" would be forced to quit; that she did quit because of the conditions and not for any other reason; and that she suffered damage as a result of being forced to quit . . .

Haubry, 106 Wn.App. at 677 (quoting Hill v. GTE Directories Sales Corp., 71 Wn.App. 132, 143, 856 P.2d 746 (1993)); see also Sneed v. Barna, 80 Wn.App. 843, 849, 912 P.2d 1035 (1996) (to establish constructive discharge, the employer must engage in a deliberate act that made working conditions so intolerable that a reasonable person would have felt compelled to resign).

Whether conditions are intolerable is a question of fact. Bulaich v. AT & T Info. Sys., 113 Wn.2d 254, 261–62, 778 P.2d 1031 (1989). The "intolerable" element can be shown by aggravated circumstances or a pattern of conduct. Sneed, 80 Wn.App. at 850 (citing Wunderly v. S.C. Johnson & Son, Inc., 828 F.Supp. 801, 806 (D. Or. 1993)). Additionally, the employee must show that he or she resigned because of the conditions and not for some other reason, like finding a better job. Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 408, 693 P.2d 708 (1985) (citing Henson v. City of Dundee, 682 F.2d 897, 907 (11th Cir. 1982)).

The question of whether an employee must prove that the employer deliberately intended to force the employee to resign, as opposed to deliberately intending to create an intolerable working atmosphere which had the effect of causing the employee's resignation, is unresolved. See Bulaich, 113 Wn.2d at 261–62. The *Bulaich* court noted a conflict among jurisdictions as to whether the employee must prove an employer's subjective intent to provoke the employee's resignation, but expressly declined to resolve that conflict.

In Peiffer v. Pro-Cut Concrete Cutting and Breaking Inc., 6

Wn.App.2d 803, 431 P.3d 1018 (2018), the Court of Appeals commented that, "the after-acquired-evidence doctrine does not apply to wrongful discharge claims, meaning that an employer's overriding justification is irrelevant unless it motivated a firing" and therefore it is unnecessary to analyze an overriding justification element in a constructive discharge case. Peiffer, 6 Wn.App.2d at 830 n.9 (citing Martin v. Gonzaga Univ., 191 Wn.2d 712, 425 P.3d 837 (2018)).

In Martini v. Boeing, 137 Wn.2d 357, 367, 971 P.2d 45 (1999), the Supreme Court held that an employee who resigned because of a failure to accommodate a disability was not required to prove constructive discharge before being entitled to damages under RCW 49.60.030(2). A plaintiff bringing a claim under RCW Chapter 49.60 need only establish that the damages were proximately caused by the discrimination. Martini, 137 Wn.2d at 368.

[Current as of October 2020.]

WPI 330.81

EMPLOYMENT DISCRIMINATION—DAMAGES—ECONOMIC AND NON-ECONOMIC—NO AFTER-ACQUIRED EVIDENCE

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for (name of employee) **, you must determine the amount of money that will reasonably and fairly compensate** (name of employee) **for such damages as you find were proximately caused by the acts of** (name of employer(s)).

If you find for (name of employee)**, [your verdict shall include the following undisputed items:**

(here insert undisputed items and amounts)

In addition] you should consider the following elements:

[(1)] [The reasonable value of lost past earnings and fringe benefits, from the date ofthe wrongful conductto the date of trial;]

[(2)] [The reasonable value of lost future earnings and fringe benefits;]

[(3)] [The physical harm to (name of employee)**;] [and]**

[(4)] [The emotional harm to (name of employee) **caused by [**(name of employer)'S**] [**(name of employers')**] wrongful conduct, including [emotional distress] [loss of enjoyment of life] [humiliation] [pain and suffering] [personal indignity, embarrassment], [fear, anxiety, and/or anguish] experienced and with**

reasonable probability to be experienced by (name of employee) **in the future].**

The burden of proving damages rests with the party claiming them, and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Any award of damages must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure [emotional distress] [loss of enjoyment of life] [humiliation] [pain and suffering] [personal indignity, embarrassment][fear, anxiety, and/or anguish]. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

NOTE ON USE

Do not use if WPI 330.81.01 (Employment Discrimination—Damages—Economic and Non-Economic—After-Acquired Evidence) is being used.

Use the first bracketed phrase when there are undisputed items of damages.

Use the bracketed paragraphs regarding elements of compensatory damages for which there is an evidentiary basis in the case. Do not use the numbers in the instruction; they are set out for discussion purposes. The numbered paragraphs include the most common elements of damages in employment discrimination cases. For guidance as to other damage issues, see WPI 30.05 (Measure of Damages—Elements of Noneconomic Damages—Disability, Disfigurement, and Loss of Enjoyment of Life) through WPI 30.09.02 (Measure of Economic Damages—Elements of Future Damages—Domestic Services/Nonmedical Expenses).

If there is a claim for wage loss, use the instruction with WPI 330.83 (Employment Discrimination—Damages—Mitigation—Wage Loss). If there is an issue regarding the amount of damages for emotional distress attributable to the defendant, it may also be appropriate to give a version of WPI 30.17 (Aggravation of Pre-Existing Condition) or WPI 30.18 (Previous Infirm Condition), and/or WPI 33.02 (Avoidable Consequences—Failure to Secure Treatment).

When there is a claim for future lost wages, using paragraph (2), use this instruction with WPI 330.82 (Employment Discrimination—Damages—Future Lost Earnings (Front Pay)). Practitioners should note that there are offsets against economic damages, including earned income and failure to mitigate. See WPI 330.83 (Employment Discrimination—Damages—Mitigation—Wage Loss), and/or WPI 33.03 (Avoidable Consequences—Property or Business), or WPI 303.06 (Contract—Mitigation of Damages) for instructions on mitigation.

For a definition of proximate cause, use WPI 15.01 (Proximate Cause—Definition) or WPI 15.01.01 (Proximate Cause—Definition—Alternative).

COMMENT

This instruction is based upon RCW Chapter 49.60, WPI 30.01.01 (Measure of Economic and Noneconomic Damages—Personal Injury—No Contributory Negligence), and numerous cases more specifically analyzing damage issues.

As in a typical personal injury case, the burden of proving damages rests with the plaintiff. In employment cases, plaintiffs are entitled to recover for personal injuries for emotional distress, humiliation, and pain and suffering. Cagle v. Burns and Roe, Inc., 106 Wn.2d 911, 726 P.2d 434 (1986); Dean v. Mun. of Metro. Seattle, 104 Wn.2d 627, 708 P.2d 393 (1985). Plaintiffs must also prove economic damages.

A plaintiff may recover damages for emotional distress so long as he or she presents evidence sufficient to support a damages award. Bunch v. King Cnty. Dep't of Youth Servs., 155 Wn.2d 165, 116 P.3d 381 (2005). Plaintiff must produce "evidence of anguish and distress." Bunch, 155 Wn.2d at 181. The plaintiff need only produce "sufficient evidence to convince an 'unprejudiced, thinking mind' of his anguish." Bunch, 155 Wn.2d at 181. Such evidence can be provided by the plaintiff's own testimony; evidence from a health care professional is not required to prove emotional distress. Bunch, 55 Wn.2d at 181. Corroboration is helpful, but the jury is the ultimate decision maker. Bunch, 155 Wn.2d at 181.

In some cases a plaintiff may recover damages for injuries sustained outside the limitations period. Adopting the reasoning in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), the Washington Supreme Courtheld that in a hostile work environment claim, an employer may be liable for acts of harassment which occurred outside the three-year statute of limitations so long as one or more acts of harassment occurred within the limitations

period. Antonius v. King Cnty., 153 Wn.2d 256, 258–59, 103 P.3d 729 (2005). It is the court's responsibility to determine whether acts "are part of the same actionable hostile work environment." Antonius, 153 Wn.2d at 271.

Under RCW Chapter 49.60, damages might be taxable income to the plaintiff. A plaintiff may recover an offset for the federal income tax consequences of a damages award under RCW 49.60.030(2). Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160, 151 Wn.2d 203, 217–18, 87 P.3d 757 (2004) (the offset is recoverable under RCW 49.60.030(2)'s "other appropriate remedy" language rather than as actual damages).

Disability benefits are not offset against wage loss if the disability benefits are a fringe benefit. Xieng v. Peoples Nat'l Bank of Wash., 120 Wn.2d 512, 844 P.2d 389 (1993). Disability benefits may be an offset against past and future wage loss when used as an indemnification by the employer against future liability. Xieng, 120 Wn.2d at 525–26.

Unemployment compensation and workers' compensationbenefits are not an offset against an award of damages for economic loss, because they come from a collateral source. Hayes v. Trulock, 51 Wn.App. 795, 803–04, 755 P.2d 830 (1988); Johnson v. Weyerhaeuser Co., 134 Wn.2d 795, 799–800, 953 P.2d 800 (1998).

An employer's immunity under RCW Title 51, the workers' compensation statutes, does not preclude a claim for damages under RCW Chapter 49.60 for physical injuries and emotional harm. Goodman v. Boeing Co., 127 Wn.2d 401, 899 P.2d 1265 (1995). There may be offsets of or subrogation to workers' compensation benefits. See Goodman, 127 Wn.2d 401; Reese v. Sears Roebuck & Co., 107 Wn.2d 563, 731 P.2d 497 (1987), overruled on other grounds by Phillips v. City of Seattle, 111 Wn.2d 903, 766 P.2d 1099 (1989).

An employee who successfully proves a violation of RCW 49.60. 180(3) has a claim for damages under this statute. The employee is not required to prove a separate claim that he or she was discharged or constructively discharged in order to seek damages for front and back pay. Martini v. Boeing Co., 137 Wn.2d 357, 363–64, 367–69, 370–72, 971 P.2d 45 (1999); RCW 49.60.030(2).

See also Weil v. Citizens Telecom Servs. Co., 2019 WL 5862965 (W.D. Wash. Nov. 8, 2019) (noting recovery of back pay or front pay by an employee who succeeds on the merits of their WLAD and Title VII discrimination claims may be limited where the employee would have been subsequently terminated for lawful or non-discriminatory reasons).

[Current as of November 2020.]

WPI 330.81.01

EMPLOYMENT DISCRIMINATION—DAMAGES—ECONOMIC AND NON-ECONOMIC—AFTER-ACQUIRED EVIDENCE

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for (name of employee)**, you must determine the amount of money that will reasonably and fairly compensate** (name of employee) **for such damages as you find were proximately caused by the acts of** (name of employer).

If you find for (name of employee)**, [your verdict shall include the following undisputed items:**

(here insert undisputed items and amounts)

In addition,] you should consider the following elements:

[(1)] [The reasonable value of lost past earnings and fringe benefits, from the date of the wrongful conduct to the date of trial;]

[(2)] [The reasonable value of lost future earnings and fringe benefits;]

[(3)] [The physical harm to (name of employee)**;] [and]**

[(4)] [The emotional harm to (name of employee) **caused by** (name of employer's) **wrongful conduct, including [emotional distress] [loss of enjoyment of life] [humiliation] [pain and suffering] [personal indignity, embarrassment] [fear, anxiety, and/or anguish] experienced and with reasonable prob-**

ability to be experienced by (name of employee) in the future].

[If you find that (name of employer) has proved its after-acquired evidence defense, you must calculate lost past earnings and fringe benefits from the date of termination to the date that additional evidence was discovered, and you may not award lost future earnings and fringe benefits.]

The burden of proving damages rests with the party claiming them, and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Any award of damages must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure [emotional distress] [loss of enjoyment of life] [humiliation] [pain and suffering] [personal indignity, embarrassment] [fear, anxiety, and/or anguish]. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

NOTE ON USE

Use this instruction instead of WPI 330.81 (Employment Discrimination—Damages—Economic and Non-Economic—No After-Acquired Evidence) in a wrongful termination case if there is evidence that (1) the employer discovered additional information after terminating the employee that was sufficient to support a lawful discharge and (2) the employer would have terminated the employee after discovering the information.

Use with WPI 330.81.02 (Employment Discrimination—Damages—After-Acquired Evidence).

COMMENT

The U.S. Supreme Court's opinion in McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 360–63, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995),

contains an extended discussion of the equitable basis for the after-acquired evidence doctrine.

The Washington Court of Appeals, Division Three, adopted the doctrine as set forth in *McKennon* in Janson v. North Valley Hospital, 93 Wn.App. 892, 971 P.2d 67 (1999). Division One followed suit in Goehle v. Fred Hutchinson Cancer Center, 100 Wn.App. 609, 1 P.3d 579 (2000), holding that after-acquired evidence could be admitted as relevant to the employee's credibility even if not used to limit damages.

In Lodis v. Corbis Holdings, Inc., 192 Wn.App. 30, 366 P.3d 1246 (2015) ("Lodis II"), the Court of Appeals erased any doubt as to the doctrine's viability:

> "The 'after-acquired evidence' doctrine precludes or limits an employee from receiving remedies for wrongful discharge if the employer later 'discovers' evidence of wrongdoing that would have led to the employee's termination had the employer known of the misconduct." An employer can avoid back pay and other remedies by coming forward with after-acquired evidence of an employee's misconduct, but only if it can prove by a preponderance of the evidence "that *the wrongdoingwas of such severity* that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."

Lodis II, 192 Wn.App. at 60 (emphasis in original).

See also Weil v. Citizens Telecom Servs. Co., 2019 WL 5862965 (W.D. Wash. Nov. 8, 2019) (noting recovery of back pay or front pay by an employee who succeeds on the merits of their WLAD and Title VII discrimination claims may be limited where the employee would have been subsequently terminated for lawful or non-discriminatory reasons).

[Current as of November 2020.]

WPI 330.81.02

EMPLOYMENT DISCRIMINATION—DAMAGES—AFTER-ACQUIRED EVIDENCE

(Name of employer) contends that even if (name of employee) had not been terminated on [date], [he] [she] would have been terminated based on the additional evidence (name of employer) discovered [at a later date] [during its investigation into his/her complaint of wrongful termination] [during the course of this lawsuit]. If (name of employer) proves by a preponderance of the evidence that it would have terminated (name of employee) based on this additional evidence, you must calculate any award of lost past earnings from the date of termination to the dateadditional evidence was discovered and you may not award any lost future earnings.

NOTE ON USE

Use this instruction in a wrongful termination case if there is evidence that (1) the employer discovered additional information after terminating the employee that was sufficient to support a lawful termination and (2) the employer would have terminated the employee after discovering the information.

Use with WPI 330.81.01 (Employment Discrimination—Damages—Economic and Non-Economic—After-Acquired Evidence) if it has been raised as an affirmative defense.

Use bracketed material as applicable. Insert names of parties where appropriate.

COMMENT

In Lodis v. Corbis Holdings, Inc., 192 Wn.App. 30, 366 P.3d 1246 (2015) ("Lodis II"), the Court of Appeals stated:

> "The 'after-acquired evidence' doctrine precludes or limits an employee from receiving remedies for wrongful discharge if the employer later 'discovers' evidence of wrongdoing that would have led to the employee's termination had the employer known of the misconduct." An employer can avoid back pay and other remedies

by coming forward with after-acquired evidence of an employee's misconduct, but only if it can prove by a preponderance of the evidence "that *the wrongdoing was of such severity* that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."

Lodis II, 192 Wn.App. at 60 (emphasis in original); see also Goehle v. Fred Hutchinson Cancer Ctr., 100 Wn.App. 609, 1 P.3d 579 (2000); Janson v. N. Valley Hosp., 93 Wn.App. 892, 971 P.2d 67 (1999).

[Current as of November 2020.]

WPI 330.82

EMPLOYMENT DISCRIMINATION—DAMAGES—FUTURE LOST EARNINGS (FRONT PAY)

In calculating damages for future wage loss [front pay], you should determine the present cash value of salary, pension, and other fringe benefits from today until the time the plaintiff may reasonably be expected to [retire] [fully recover from the continuing effects of the discrimination], decreased by any projected future earnings [from another employer].

NOTE ON USE

Use this instruction when the plaintiff requests front pay as an element of damages, together with paragraph (2) of WPI 330.81 (Employment Discrimination—Damages—Economic and Non-Economic—No After-Acquired Evidence).

Use of the term "retire" may not be appropriate in all cases. This instruction may have to be modified if there is proof in the case that the business was or will be sold.

As appropriate, combine this instruction with applicable portions of WPI 34.02 (Damages Arising in the Future—Discount to Present Cash Value).

COMMENT

Front pay and reinstatement are generally viewed as alternative remedies. Front pay is a jury issue under Washington law. The issue of reinstatement is more complex.It is an equitable remedy for decision by the court. It will be necessary to evaluate the appropriateness of a front pay instruction in a case in which potential reinstatement is an issue. Goodman v. Boeing Co., 75 Wn.App. 60, 78–79, 877 P.2d 703 (1994), affirmed, 127 Wn.2d 401, 899 P.2d 1265 (1995); Wheeler v. Catholic Archdiocese of Seattle, 65 Wn.App. 552, 573, 829 P.2d 196 (1992), reversed on other grounds, 124 Wn.2d 634, 880 P.2d 29 (1994).

"Front pay should be awarded 'for a reasonably certain period of time that does not exceed the likely duration of the terminated employment.' " Lords v. N. Auto. Corp., 75 Wn.App. 589, 605, 881 P.2d 256 (1994), overruled on other grounds by Mackay v. Acorn Custom

Cabinetry, Inc., 127 Wn.2d 302, 898 P.2d 284 (1995) (quoting Hayes v. Trulock, 51 Wn.App. 795, 802, 755 P.2d 830 (1988)); see also Weil v. Citizens Telecom Servs. Co., 2019 WL 5862965 (W.D. Wash. Nov. 8, 2019) (noting recovery of back pay or front pay by an employee who succeeds on the merits of their WLAD and Title VII discrimination claims may be limited where the employee would have been subsequently terminated for lawful or non-discriminatory reasons).

In an age discrimination case, unless the employer provides evidence to the contrary, a jury may be told to consider that an illegally-discharged employee would have continued working for the employer until he or she reached the normal age of retirement. See Lords, 75 Wn.App. at 605. In other cases, the determination of future lost earnings, including the number of years, is generally left to the jury to determine, once an employee produces evidence from which a reasonable future employment period may be projected. See also Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160, 151 Wn.2d 203, 210–11, 87 P.3d 757 (2004) (front pay instruction to calculate future damages from today until the time plaintiff may reasonably be expected to retire was improper because duration of future employment may not extend to retirement).

In *Goodman,* an award of damages had included subrogating the employer to the plaintiff's future workers' compensation benefits. Goodman, 75 Wn.App. at 87–88.

[Current as of November 2020.]

WPI 330.83

EMPLOYMENT DISCRIMINATION—DAMAGES—MITIGATION—WAGE LOSS

The plaintiff, (name of plaintiff), has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

To establish a failure to mitigate, defendant, (name of defendant), has the burden of proving:

(1) There were openings in comparable positions available for (name of plaintiff) elsewhere after (name of defendant) [terminated] [refused to hire] [him] [her];

(2) (Name of plaintiff) failed to use reasonable care and diligence in seeking those openings; and

(3) The amount by which damages would have been reduced if (name of plaintiff) had used reasonable care and diligence in seeking those openings.

You should take into account the characteristics of (name of plaintiff) and the job market in evaluating the reasonableness of (name of plaintiff's) efforts to mitigate damages.

If you find that (name of defendant) has proved all of the above, you should reduce your award of damages for wage loss accordingly.

NOTE ON USE

This instruction is to be used when the plaintiff challenges as discriminatory a discrete employment decision, such as a termination or a failure to hire. When mitigation of damages other than for wage loss is at issue, see WPI 33.02 (Avoidable Consequences—Failure to Secure Treatment).

Whether a mitigation instruction is used will typically depend on whether the employer has pleaded and offered proof on the defense.

COMMENT

This instruction is adapted from Burnside v. Simpson Paper Co., 66 Wn.App. 510, 529, 832 P.2d 537 (1992), affirmed, 123 Wn.2d 93, 864 P.2d 937 (1994), overruled on other grounds by Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 898 P.2d 284 (1995); see also Henningsen v. Worldcom, Inc., 102 Wn.App. 828, 846, 9 P.3d 948 (2000); Kloss v. Honeywell, Inc., 77 Wn.App. 294, 301–02, 890 P.2d 480 (1995). Washington cases have not defined "comparable position."

Failure to mitigate damages is an affirmative defense under CR 8(c). Bernsen v. Big Bend Elec. Co-op., Inc., 68 Wn.App. 427, 433, 842 P.2d 1047 (1993); see also, Fed. Signal Corp. v.Safety Factors, Inc., 125 Wn.2d 413, 438, 886 P.2d 172 (1994); Burnside, 66 Wn.App. at 529.

Mitigation focuses on the reasonableness of the employee's conduct after the alleged discrimination has occurred. See Cobb v. Snohomish Cnty., 86 Wn.App. 223, 232, 935 P.2d 1384 (1997) ("The doctrine of avoidable consequences [i.e., the duty to mitigate] applies only to damages for harm the plaintiff could have avoided after the tort was committed."); Bernsen, 68 Wn.App. at 433.

"Success [at mitigation] is not required, nor is the failure to earn a substantial income dispositive of the question of whether a[n] . . . employee exercised reasonable diligence." Burnside, 66 Wn.App. at 530; see also Sutton v. Shufelberger, 31 Wn.App. 579, 581, 643 P.2d 920 (1982) (because the duty to mitigate only requires one to take reasonable steps, it is error to instruct jury the duty requires one to obtain another job).

[Current as of November 2020.]

WPI 330.90

EMPLOYMENT DISCRIMINATION—EMPLOYEE VERSUS INDEPENDENT CONTRACTOR (MINIMUM WAGE ACT)

You must decide whether (name of plaintiff) **was an employee of or an independent contractor of** (name of defendant). **This decision requires you to determine whether, as a matter of economic reality,** (name of plaintiff) **is economically dependent upon** (name of defendant) **or is instead in business for [himself/herself].**

In deciding economic dependence, you should consider all of the evidence bearing on the question, including the following factors:

(1) Right to control, and degree of control exercised by (name of defendant) **over** (name of plaintiff)**;**

(2) the extent of the relative investments of (name of plaintiff) **and** (name of defendant)**;**

(3) the degree to which (name of plaintiff)**'s opportunity for profit or loss is determined by** (name of defendant)**;**

(4) the skill and initiative required in performing the job;

(5) the degree of permanence of the working relationship; and

(6) whether the service rendered is an integral part of (name of defendant)**'s business.**

This list of factors is nonexclusive, and no single factor should control your decision.

NOTE ON USE

Use this instruction where the employer asserts that the plaintiff

was an independent contractor for purposes of Washington's Minimum Wage Act, RCW Chapter 49.46.

This instruction should be used with an instruction setting forth the elements of the Minimum Wage Act claim being asserted.

COMMENT

The court's opinion in Anfinson v. FedEx Ground Package Systems, Inc., 174 Wn.2d 851, 869–71, 281 P.3d 289 (2012), contains an extensive discussion about the proper interpretation of "employee" under the Minimum Wage Act. In *Anfinson*, the court noted that "[f]ederal courts have established competing lists of nonexclusive factors that are relevant to the determination . . . ." Anfinson, 174 Wn.2d at 869 (citing Hopkins v. Cornerstone Am., 545 F.3d 338, 343 (5th Cir. 2008); Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754 (9th Cir. 1979)). The six factors in the instruction above are taken from these cases.

[Current as of January 2021.]

WPI 330.91

EMPLOYMENT DISCRIMINATION—JOINT EMPLOYER STATUS (MINIMUM WAGE ACT)

You must determine whether, as a matter of economic reality, (name of alleged employer) was a joint employer of (name of alleged employee).

(Name of alleged employer) was (name of alleged employee)'s joint employer if (alleged employee) was economically dependent upon or controlled by (alleged employer). You should consider the following factors in making this determination:

(1) the nature and degree of control of the workers by (name of alleged employer);

(2) the degree of supervision, direct or indirect, of the work by (name of alleged employer);

(3) (name of alleged employer)'s power to determine the pay rates or the methods of payment of the workers;

(4) (name of alleged employer)'s right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers;

(5) (name of alleged employer)'s preparation of payroll and the payment of wages;

(6) whether the work was similar to that of a specialty job in a production line [such as one small step in a sequence of steps];

(7) whether responsibility under the contracts between a labor contractor and (name of alleged employer) pass from one labor contractor to another without material changes;

(8) whether the premises and equipment of (name of alleged employer) are used for the work;

(9) whether (name of alleged employee) belonged to a business organization that could or did shift as a unit from one worksite to another;

(10) whether the work was "piecework" and not work that required initiative, judgment, or foresight;

(11) whether (name of alleged employee) had an opportunity for profit or loss depending on [his] [her] managerial skill;

(12) whether there was permanence in the working relationship; and

(13) whether the service rendered is an integral part of (name of alleged employer)'s business.

This list of factors is nonexclusive, and no single factor should control your decision. You should evaluate all the circumstances and you should give each factor whatever weight you deem appropriate. How the parties characterize their relationship is not determinative.

NOTE ON USE

Use this instruction when a party claims that another party was a joint employer under the Minimum Wage Act (MWA) and there is evidence to allow the jury to find joint-employer status. This instruction should be used with an instruction setting forth the elements of the Minimum Wage Act claim being asserted.

When there are multiple alleged joint employers, repeat the first paragraph of this section as necessary.

Insert the names of the parties where appropriate, especially when there are multiple alleged joint employers.

COMMENT

This instruction was modified for this edition to clarify that the factors are relevant to determine economic dependence.

In Becerra v. Expert Janitorial, LLC, 181 Wn.2d 186, 195–97, 332 P.3d 415 (2014), the Washington Supreme Court adopted the 13-factor economic-reality test articulated in Torres-Lopez v. May, 111 F.3d 633, 639–45 (9th Cir. 1997), and explained that additional factors are appropriate if supported by the evidence. For example, the *Becerra* court stated:

> Here, our Court of Appeals properly found that these factors may include whether the putative joint employer knew of the wage and hour violation, whether it paid sufficient amounts to the subcontractors to allow for a lawful wage, and whether the subcontracting arrangement is a " 'subterfuge or sham.' "

Becerra, 181 Wn.2d at 198 (quoting Becerra v. Expert Janitorial, LLC, 176 Wn.App. 694, 719, 309 P.3d 711 (2011)).

Erroneously, the trial court in *Becerra* limited consideration to the first five factors based on its belief that factors six through eleven, the "*Rutherford* factors," Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947), were not applicable outside a production line work setting such as the meat packing line at issue in *Rutherford*. In reversing that limitation, the Court of Appeals noted that because the work force is shifting away from a production line economy:

> [i]f our courts were to limit their full examinations of potential joint employment relationships to "production line" jobs, employers in the fastest growing sectors of our economy would be insulated from complying with the requirements of the MWA [Minimum Wage Act] and FLSA [Fair Labor Standards Act]. This runs counter to the remedial purposes of both acts.

Becerra, 176 Wn.App. at 712–13.

[Current as of January 2021.]

PART XVIII

COMMERCIAL LITIGATION

CHAPTER 351

TRADE SECRETS

WPI 351.01 Trade Secrets—Burden of Proof
WPI 351.02 Trade Secret—Definition
WPI 351.03 Misappropriation—Definition
WPI 351.05 Independent Economic Value—Definition
WPI 351.07 Reverse Engineering—Definition
WPI 351.08 Reasonable Efforts to Maintain Secrecy—Definition

WPI 351.01

TRADE SECRETS—BURDEN OF PROOF

On the claim of misappropriated trade secrets, (name of plaintiff) has the burden of proving each of the following propositions:

(1) That (name of plaintiff) had a trade secret;

(2) That (name of defendant) misappropriated (name of plaintiff)'s trade secret; and

[(3) That (name of defendant)'s misappropriation was a proximate cause of damages to (name of plaintiff)]

[(3) That, as a result of the misappropriation, (name of defendant) received money or benefits that in justice and fairness belong to (name of plaintiff)].

If you find from your consideration of all the evidence that each of these propositions has been proved, then

your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

Use this instruction in a trade secrets case not involving any affirmative defenses. For trade secrets cases having an affirmative defense, set forth the affirmative defense using WPI 21.05 (Burden of Proof on the Issues—Affirmative Defenses Other than Contributory Negligence/Assumption of Risk).

This instruction includes alternative versions of the third element. Choose from between these two alternatives depending on whether the plaintiff claims actual damages or unjust enrichment. For a discussion of the alternative version for unjust enrichment, see the Comment below. If a plaintiff claims both damages and unjust enrichment, then the instruction will need to be modified in accordance with the discussion in the Comment below.

For a discussion of punitive damages or other damages instructions, see the Comment below.

Use this instruction with WPI 351.02 (Trade Secret—Definition), WPI 351.03 (Misappropriation—Definition), and WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence).

When vicarious liability is an issue, this instruction may be used with the appropriate instruction from WPI Chapter 50 (Agency and Partnership). For further discussion, see the Comment.

If needed, a "summary of claims" instruction may be drafted using WPI Chapter 20 (Issues in the Case), as modified to fit a trade secrets case.

COMMENT

Background. Washington adopted the Uniform Trade Secrets Act in 1981, with some variations from the Uniform Act. Washington has not adopted the 1985 amendments to the Uniform Act. The Act is codified as RCW Chapter 19.108. For an extended discussion of the Uniform Act and its general principles, see Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 46–61, 738 P.2d 665 (1987).

"In the absence of legislative intent to the contrary, prior common law which is not contradicted by the Uniform Trade Secrets Act should

continue to guide courts in the interpretation of the Act." Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 444–45, 971 P.2d 936 (1999). Nevertheless, courts should also construe the Washington statute with the objective of national uniformity when possible. Thola v. Henschell, 140 Wn.App. 70, 78, 164 P.3d 524 (2007).

Existence of trade secret. A plaintiff seeking damages for the misappropriation of a trade secret has the burden of proving that a legally protectable trade secret exists. Ed Nowogroski Ins., 137 Wn.2d at 439; Boeing, 108 Wn.2d at 49.

Multiple forms of damages. Under the Act, plaintiffs may recover actual damages, restitution for unjust enrichment, and punitive damages, with limitations noted below. RCW 19.108.030. The 1985 amendments to the Uniform Act added explicit provision for recovery of royalties, but Washington has not adopted that change.

Under the Act, a jury's verdict may combine recoveries for actual damages and unjust enrichment in a single case, but only to the extent that the award for unjust enrichment does not duplicate the recovery of actual damages. See RCW 19.108.030(1) ("A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss."). If both forms of damages are being presented to the jury, the instruction will need to be modified to clearly express this limitation. For example: "The law does not permit a plaintiff to recover twice for the same damages. Thus, you may include as damages *both* plaintiff's lost profits *and* defendant's gain *only* if and to the extent that they do not overlap in this way." Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.6.2 (4th ed. 2005).

Unjust enrichment. Washington courts have described the doctrine of unjust enrichment as the:

> [g]eneral principle that one person should not be permitted unjustly to enrich himself at expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.

Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc., 61 Wn.App. 151, 159, 810 P.2d 12, amended by 814 P.2d 699 (1991) (quoting Black's Law Dictionary (6th ed. 1990)) (citations omitted). WPI 351.01 follows this

approach but uses the word "fairness" instead of "equity" for better juror comprehension.

Under this unjust enrichment alternative, the Court of Appeals has held that, once the plaintiff proves sales attributable to the use of a trade secret, the burden shifts to the defendant to establish "any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits." Petters v. Williamson & Assocs., Inc., 151 Wn.App. 154, 165, 210 P.3d 1048 (2009) (quoting Restatement (Third) of Unfair Competition § 45 cmt. f (1995)). See also the Comment to WPI 301A.02 (Quasi Contract). The phrase "attributable to the use of a trade secret" is required in the damages jury instructions to ensure the plaintiff satisfies its burden of proof with sales related to the use of a trade secret, and not with gross sales data. Ada Motors, Inc. v. Butler, 7 Wn.App.2d 53, 63, 432 P.3d 445 (2018), review denied 193 Wn.2d 1013 (2019).

Punitive damages. The Act allows for the imposition of punitive damages. Under the Act, "[i]f willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award [for actual damages and unjust enrichment]." RCW 19.108.030(2).

Pursuant to this statute, the amount of any punitive damages is determined by the judge, not the jury, after a threshold finding has been made as to willful and malicious misappropriation. Thola, 140 Wn.App. at 89 (trial court determines exemplary damages and fees in its discretion); see Unif. Trade Secrets Act with 1985 Amendments, § 3 comment, 14 U.L.A. (2005) (clarifying that "the court" in this context means the judge); Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.7 (4th ed. 2005).

The statute, however, is unclear as to whether the threshold finding of willful and malicious misappropriation in a jury case is to be made by the judge or the jury. Several Washington cases highlight this ambiguity, although in none of the cases was this issue directly addressed in the opinion. In three cases, the trial judges submitted the threshold factual finding to the jury and used that finding in deciding whether to impose punitive damages. Ada Motors, 7 Wn.App.2d at 58; Eagle Grp., Inc. v. Pullen, 114 Wn.App. 409, 422, 58 P.3d 292 (2002); Thola, 140 Wn.App. 70 (award of exemplary damages reversed on appeal for other reasons). In another case, the parties agreed that the trial judge should decide both the threshold factual issue and the ensuing issue of the amount of any punitive damages. Boeing, 108 Wn.2d at 61–62.

Because this issue remains unsettled, the instructions for a particu-

lar case will depend on who the judge determines should make the threshold finding. If the judge rules that "willful and malicious misappropriation" is to be determined by the jury rather than the judge, then the jurors should be given the following special interrogatory: "If you find that (name of defendant) misappropriated a trade secret, was this misappropriation willful and malicious?" If, however, the threshold issue is to be determined by the judge, then the jurors need not be instructed on punitive damages at all.

Separate damages instruction. A separate damages instruction will need to be drafted, using one of the instructions from WPI Chapter 30 (Personal and Property Damages) as a model, setting forth in greater detail the methods for calculating actual damages and unjust enrichment. The contents of this instruction will necessarily vary depending on the facts of each case.

Actual damages are generally calculated by measuring the plaintiff's lost profits, while unjust enrichment awards are generally calculated by measuring the defendant's ill-gotten profits. See Rosenhouse, Annotation, Proper Measure and Elements of Damages for Misappropriation of Trade Secret, 11 A.L.R.4th 12, § 2[a] (1982); Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.6 (4th ed. 2005). Actual damages include both past and future lost profits, as well as related expenses. Eagle Grp., 114 Wn.App. at 420–21 (also setting forth a damages instruction addressing actual damages).

In an unjust enrichment trade case, the damages instruction should include this provision: "The plaintiff has the initial burden of proving sales attributable to the trade secret. Then the burden shifts to the defendant to establish any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits." Ada Motors, 7 Wn.App.2d at 63.

Pre-emption issues. The Act does not displace other statutory or common law claims for misappropriation of intellectual property except to the extent that these remedies conflict with those provided by the Act. Boeing, 108 Wn.2d at 48. The issue in Boeing was whether the plaintiff's claims for breach of a confidential relationship, breach of contract, and the misappropriation of trade should have been consolidated into one claim under the Uniform Trade Secrets Act. The Supreme Court affirmed verdicts under all three claims. The Court did not consider whether the claims were based on the same underlying facts. See SEIU Healthcare Nw. Training P'ship v. Evergreen Freedom Found., 5 Wn.App.2d 496, 508, 427 P.3d 688 (2018), review denied 192 Wn.2d 1025 (2019).

Division II of the Court of Appeals took a "factual preemption" approach in Thola v. Henschell, 140 Wn.App. 70, 82, 85, 164 P.3d 524 (2007). In holding that the trial court erroneously failed to instruct the jury that evidence of misappropriation of trade secrets could not be used to support common law claims, and without citing *Boeing*, the appellate court stated the Act is the exclusive remedy for the misappropriation of trade secrets. According to the *Thola* court, claims seeking recovery based on tort, restitution, or other legal theories must be supported by evidence of conduct other than the misappropriation of trade secrets. Thola, 140 Wn.App. at 82, 85.

Division I of the Court of Appeals, relying on the Washington Supreme Court's *Boeing* decision, has declined to follow *Thola*. The court held that common law confidentiality claims are not preempted by trade secrets claims under the Act, regardless of whether they are based on the same facts. Modumetal, Inc. v. Xtalic Corp., 4 Wn.App.2d 810, 829–31, 425 P.3d 871 (2018) ("Until or unless the Washington Supreme Court overrules *Boeing* and adopts the *Thola* analysis, *Boeing* controls.").

Citing *Modumetal*, and again disavowing *Thola*, Division I recently held the Act does not displace a statutory replevin claim. The court noted the replevin statute, RCW 7.64.010, expressly provides that its remedies "are in addition to any other remedy available to the plaintiff," and that language was added nine years after enactment of the Uniform Trade Secrets Act. SEIU Healthcare, 5 Wn.App.2d at 503.

Vicarious liability. In some cases, vicarious liability may be an issue. See Thola, 140 Wn.App. at 78–79 (vicarious liability is a general civil liability principle that is consistent with Uniform Trade Secrets Act).

Cross-reference. An extended discussion of the Uniform Trade Secrets Act can be found in another volume of Washington Practice. See DeWolf & Allen, 16A Washington Practice, Tort Law and Practice § 23:9 (4th ed.). The pre-emption issue is discussed in DeWolf & Allen, 16A Washington Practice, Tort Law and Practice § 23:10 (5th ed.).

[Current as of February 2021.]

WPI 351.02

TRADE SECRET—DEFINITION

Washington law prohibits misappropriation of a trade secret. "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:

(1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

NOTE ON USE

This instruction defines a term used in WPI 351.01 (Trade Secrets—Burden of Proof). The following instructions should also be used: WPI 351.05 (Independent Economic Value—Definition) and WPI 351.08 (Reasonable Efforts to Maintain Secrecy—Definition).

COMMENT

The instruction is based on RCW 19.108.010.

While the definition of a trade secret is a matter of law under the Uniform Trade Secrets Act, the determination in a given case whether specific information is a trade secret is a factual question. Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 436, 971 P.2d 936 (1999); Woo v. Fireman's Fund Ins. Co., 137 Wn.App. 480, 487, 154 P.3d 236 (2007) (application of legal test is fact-specific).

Washington case law interpreting "trade secret." For a trade secret to exist, the underlying information must not be "readily ascertainable by proper means" from some other source, including the product itself. Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 49–50, 738 P.2d 665 (1987); Modumetal, Inc. v. Xtalic Corp., 4 Wn.App.2d 810, 824, 425 P.3d 871 (2018); Belo Mgmt. Servs., Inc. v. Click! Network, 184 Wn.App. 649, 343 P.3d 370 (2014).

Although undefined in the Uniform Trade Secrets Act, a "compila-

tion" has been defined as "something that is a product of the putting together of two or more items: as . . . an accumulation of many things, elements, or influences." Lyft, Inc. v. City of Seattle, 190 Wn.2d 769, 782, 418 P.3d 102 (2018) (internal quotes and citation omitted). A compilation of information may constitute a trade secret even though the plaintiff cannot prove that every element of the compilation is unavailable elsewhere. Trade secrets frequently contain elements that by themselves may be in the public domain, but which together qualify as trade secrets. Boeing, 108 Wn.2d at 50; Machen, Inc. v. Aircraft Design, Inc., 65 Wn.App. 319, 327, 828 P.2d 73 (1992), overruled on other grounds by Waterjet Tech., Inc. v. Flow Int'l Corp., 140 Wn.2d 313, 996 P.2d 598 (2000). On the other hand, when the information is in the public domain, and the end product of the information is unoriginal, there is no trade secret. Woo, 137 Wn.App. at 488–89 (combination of public data must be novel and unique); Buffets, Inc. v. Klinke, 73 F.3d 965, 968 (9th Cir. 1996) (stating that a plaintiff must prove novelty to establish trade secret under Washington law); see West v. Port of Olympia, 146 Wn.App. 108, 120, 192 P.3d 926 (2008) (information "must be 'novel' in the sense that the information must not be readily ascertainable from another source").

"[W]hether a customer list is protected as a trade secret depends on three factual inquiries: (1) whether the list is a compilation of information; (2) whether it is valuable because unknown to others; and (3) whether the owner has made reasonable attempts to keep the information secret." Ed Nowogroski, 137 Wn.2d at 442.

The requirement of secrecy is not absolute so long as reasonable efforts have been taken to maintain secrecy. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 94 S.Ct. 1879, 40 L.Ed.2d 315 (1974); K-2 Ski Co. v. Head Ski Co., 506 F.2d 471, 474 (9th Cir. 1974); Machen, 65 Wn.App. at 327.

Trade secrets are not lost merely by such factors as the passage of time, submission to a licensing agency for purposes of government certification, or confidential disclosures to such persons as employees or suppliers. Boeing, 108 Wn.2d at 52. When the information is given out to employees without advising them of its confidentiality, or of measures to be taken to prevent its being obtained by others, security efforts may not be reasonable, even if the defendant actually obtains the information by improper means. Buffets, 73 F.3d at 968.

[Current as of December 2020.]

WPI 351.03

MISAPPROPRIATION—DEFINITION

"Misappropriation" of a trade secret means [acquisition] [disclosure] [or] [use] of a trade secret, without the express or implied consent of the owner of the trade secret, by a person who:

[(1)] [Used improper means to acquire the trade secret;] [or]

[(2)] [At the time of acquisition, disclosure, or use, knew or had reason to know that his or her knowledge of the trade secret was:

[(a)] [derived from or through a person who had utilized improper means to acquire it;] [or]

[(b)] [acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use;] [or]

[(c)] [derived from or through a person who owed a duty to the plaintiff to maintain its secrecy or limit its use;]] [or]

[(3)] [Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.]

NOTE ON USE

This instruction defines a term used in the burden of proof instruction, WPI 351.01, which should accompany this instruction. When appropriate, use WPI 351.04 (Improper Means—Definition) with this instruction.

Use the bracketed material as applicable to the particular case and renumber accordingly.

COMMENT

This instruction is based on the language of RCW 19.108.010(2). The wording has in some places been simplified to increase juror understanding. No substantive departure from the statute is intended

Misappropriations are not limited to the physical or electronic taking of protected information. A misappropriation may also occur when a person memorizes trade secrets and later reveals them to others. Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 971 P.2d 936 (1999) (customer list). The act of filing patent applications that include trade secrets is sufficient to constitute misappropriation. Modumetal, Inc. v. Xtalic Corp., 4 Wn.App.2d 810, 824–25, 425 P.3d 871 (2018).

A misappropriation may sometimes be based on a duty to maintain secrecy. RCW 19.108.010(2)(b). A confidential relationship imposes an obligation not to disclose a trade secret or use it for other purposes. Pacific Aerospace & Elecs., Inc. v. Taylor, 295 F.Supp.2d 1205, 1212 (E.D. Wash. 2003) (applying Washington law).

[Current as of December 2020.]

WPI 351.05

INDEPENDENT ECONOMIC VALUE—DEFINITION

Information has "independent economic value" if it gives the owner of the information a competitive advantage over others who do not know the information.

In determining whether information derives "independent economic value" from not being generally known or readily ascertainable, you may consider, among other factors, the following:

(1) The value of the information to the plaintiff and to the plaintiff's competitors;

(2) The amount of effort or money that the plaintiff expended in developing the information;

(3) The extent of measures that the plaintiff took to guard the secrecy of the information;

(4) The ease or difficulty of acquiring or duplicating the information by proper means;

(5) The degree to which third parties have placed the information in the public domain or rendered the information readily ascertainable.

NOTE ON USE

This instruction should be used with WPI 351.02 (Trade Secret—Definition). Not all of the factors in the second paragraph might apply to a particular case, and other factors—or no specific factors at all—might be appropriate to assure that the instruction does not constitute a comment on the evidence by emphasizing some factors disproportionately.

COMMENT

The Uniform Trade Secrets Act does not define "independent economic value." Nevertheless, in order for information to qualify as a

trade secret, the information must derive "independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use." RCW 19.108.010(4)(a). In determining whether information has "independent economic value" under the Uniform Trade Secrets Act, most courts look to whether the information confers a "competitive advantage" upon the plaintiff. Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.3.3 (4th ed. 2005), and cases cited therein. See also cases collected in Unif. Trade Secrets Act with 1985 Amendments § 1, Notes of Decisions n.46, 14 U.L.A. (2005).

This is consistent with the common law rule that only those secrets affording a competitive advantage may properly be considered trade secrets. See Restatement (Third) of Unfair Competition § 39 (1995) ("A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.").

In related contexts, courts interpreting RCW 19.108.010(4) (definition of trade secret) have also emphasized the importance of the competitive advantage that arises from knowledge of a trade secret. For example, in Buffets, Inc. v. Klinke, 73 F.3d 965, 968–69 (9th Cir. 1996), the plaintiff was held not to have established "independent economic value" simply by showing competitors' lack of success, when there was "no demonstrated relationship" between their lack of success and the unavailability of the alleged trade secret.

In Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 437, 971 P.2d 936 (1999), the court noted that "[w]here [a] former employee seeks to use the trade secrets of the former employer in order to obtain a competitive advantage, then competitive activity can be enjoined or result in an award of damages." See also Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 52, 738 P.2d 665 (1987) (holding that confidential information did not lose its trade secret status upon submission to the FAA, as the information submitted was exempt from public disclosure "because it could substantially harm the competitive position of the entity . . . required to submit [it]").

"In determining whether information has 'independent economic value' under the Uniform Trade Secrets Act, one of the key factors used by the courts is the effort and expense that was expended on developing the information." Ed Nowogroski, 137 Wn.2d at 438; see Pacific Aerospace & Elecs., Inc. v. Taylor, 295 F.Supp.2d 1205, 1214–15 (E.D. Wash. 2003) (defendant attributed economic value to the information and did not compile it from allegedly available public sources). But even

in a setting where the assertedly secret information was collected fairly easily, the court still concluded it possessed independent economic value because it was shown to have marketing value and not to be readily ascertainable by competitors. Lyft, Inc. v. City of Seattle, 190 Wn.2d 769, 783, 418 P.3d 102 (2018) (zip code reports for Lyft rides determined to be the proper subject of trade secret claim).

Other courts have identified the following factors that a court may examine to determine whether information derives independent economic value from not being generally known or readily ascertainable:

> (1) the value of the information to the plaintiff and to the plaintiff's competitors; (2) the amount of effort or money that the plaintiff expended in developing the information; (3) the extent of measures that the plaintiff took to guard the secrecy of the information; (4) the ease or difficulty with which others could properly acquire or duplicate the information; and (5) the degree to which third parties have placed the information in the public domain or rendered the information readily ascertainable.

See Spottiswoode v. Levine, 1999 ME 79, ¶ 27 n.6, 730 A.2d 166, 174 n.6, and cases cited therein.

For another phrasing of factors to consider, see Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.3.3 (4th ed. 2005).

> While a defendant does not need to go so far as to establish that the information is known to or readily ascertainable to the general public to defeat a trade secret claim, a plaintiff cannot establish that a trade secret exists if the information is generally known to or readily ascertainable by other persons who can obtain economic value from its disclosure or use.

Precision Moulding & Frame, Inc. v. Simpson Door Co., 77 Wn.App. 20, 26, 888 P.2d 1239 (1995). That is, the "existence of a trade secret [is] measured by the accessibility of the information within a given industry." Precision, 77 Wn.App. at 26–27.

[Current as of December 2020.]

WPI 351.07

REVERSE ENGINEERING—DEFINITION

Reverse engineering is the process of recreating trade secret information by analyzing a product that was properly acquired.

NOTE ON USE

Use this instruction with WPI 351.04 (Improper Means—Definition) when there is an issue as to whether the defendant obtained, or easily and inexpensively could have obtained, the information through reverse engineering.

COMMENT

This instruction is designed to explain to the jury what is meant by "reverse engineering." In the American Bar Association's proposed instruction on "improper means," reverse engineering is described as the "purchase of a product that contains trade secrets and then disassembling it to analyze those secrets." Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.4.1 (4th ed. 2005). In the ABA's proposed instruction on "competitive advantage," reverse engineering is described as "taking apart and analyzing a product properly acquired to learn its secrets." Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.3.3 (4th ed. 2005).

As a general rule, reverse engineering is a proper means of acquiring trade secret information. See Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 53–54, 738 P.2d 665 (1987); Restatement (First) of Torts § 757 cmt. a (1939); Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.4.1 (4th ed. 2005).

The jury may also consider evidence of whether the plaintiff's claimed trade secret could be reverse engineered for purposes of determining whether the plaintiff's information met the standards of secrecy required of a trade secret. See the Comment to WPI 351.04 (Improper Means—Definition); see also Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.3.3, p. 405 (4th ed. 2005).

[Current as of December 2020.]

WPI 351.08

REASONABLE EFFORTS TO MAINTAIN SECRECY—DEFINITION

In determining whether information is "the subject of efforts that are reasonable under the circumstances to maintain its secrecy," you may consider, among other factors, the following:

(1) The extent to which the information is known outside the plaintiff's business;

(2) The extent to which employees and others in the plaintiff's business know the information;

(3) The nature and extent of the measures the plaintiff took to guard the secrecy of the information;

(4) The existence or absence of an express agreement restricting disclosure; and

(5) The extent to which the circumstances under which the information was disclosed to others indicate that further disclosure without the plaintiff's consent was prohibited.

NOTE ON USE

This instruction should be used with WPI 351.02 (Trade Secret—Definition) in those instances when the reasonableness of the plaintiff's efforts to maintain the secrecy of the alleged trade secret is at issue.

In particular cases, the word "business" will need to be modified to a more appropriate term, such as "occupation" or "field."

COMMENT

For information to qualify as a trade secret, the information must be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." See RCW 19.108.010(4)(b); Robbins, Geller, Rudman & Dowd, LLP v. State, 179 Wn.App. 711, 328 P.3d 905 (2014).

In determining whether information is the subject of reasonable efforts to maintain its secrecy, other courts have identified the following factors that a court may examine:

> (1) the extent to which the information is known outside the plaintiff's business; (2) the extent to which employees and others involved in the plaintiff's business know the information; (3) the nature and extent of measures the plaintiff took to guard the secrecy of the information; (4) the existence or absence of an express agreement restricting disclosure; and (5) the circumstances under which the information was disclosed . . ., to the extent that the circumstances give rise to a reasonable inference that further disclosure without the plaintiff's consent is prohibited.

Spottiswoode v. Levine, 1999 ME 79, ¶ 27 n.7, 730 A.2d 166, 175 n.7.

For another phrasing of factors to consider, see Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 8.3.2, p. 401 (4th ed. 2005).

[Current as of December 2020.]

CHAPTER 352

TORTIOUS INTERFERENCE WITH ECONOMIC RELATIONS

WPI 352.01	Tortious Interference With Contract—Burden of Proof on the Issues—No Affirmative Defense
WPI 352.01.01	Tortious Interference With Contract—Burden of Proof on the Issues—With Affirmative Defenses
WPI 352.02	Tortious Interference With Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense
WPI 352.02.01	Tortious Interference With Business Expectancy—Burden of Proof on the Issues—With Affirmative Defenses
WPI 352.03	Tortious Interference—Improper Purpose—Improper Means—Definitions
WPI 352.04	Tortious Interference With Contract—Affirmative Defense—Legally Protected Interest
WPI 352.05	Tortious Interference With Business Expectancy—Affirmative Defense—Competition
WPI 352.06	Tortious Interference With Business Expectancy—Affirmative Defense—Financial Interest

WPI 352.01

TORTIOUS INTERFERENCE WITH CONTRACT—BURDEN OF PROOF ON THE ISSUES—NO AFFIRMATIVE DEFENSE

To recover on a claim of tortious interference with contract, (name of plaintiff) has the burden of proving each of the following propositions:

(1) That at the time of the conduct at issue, (name of plaintiff) was a party to a valid contract with (name of contracted party) [to (state purpose of contract)];

(2) That (name of defendant) knew of the existence of that contract;

(3) That (name of defendant) **[intentionally induced or caused** (name of contracted party) **to breach the contract with** (name of plaintiff)**] [prevented** (name of plaintiff)**'s performance of the contract] [caused** (name of plaintiff)**'s performance to be more expensive or burdensome];**

(4) That (name of defendant)**'s interference was for an improper purpose or by improper means, as defined later in these instructions; and**

(5) That the conduct of (name of defendant) **was a proximate cause of damages to** (name of plaintiff)**.**

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) **[on this claim]. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for** (name of defendant) **[on this claim].**

NOTE ON USE

This instruction is designed for use in a tortious interference with contract case, without an affirmative defense. For a tortious interference with contract case with one or more affirmative defenses, use WPI 352.01.01 (Tortious Interference with Contract—Burden of Proof on the Issues—With Affirmative Defenses).

Use bracketed material as applicable. Use the bracketed phrase about inducement or causation of breach of contract when it is supported by the evidence. Use the bracketed phrases about prevention of performance or imposition of additional burden or expense of performance when they are supported by the evidence.

For a case based on tortious interference with a business relationship or expectancy that has not ripened into a contract, use WPI 352.02 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense) instead of this instruction.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof) and with an instruction defining proximate cause—WPI 15.01 (the traditional instruction) or WPI 15.01.01 (the alternative instruction).

Use this instruction with WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions) when appropriate to the case.

If the alleged interference is with a contract that is terminable at will, use WPI 352.02 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense) instead of this instruction. See the Comment to WPI 352.02 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense).

COMMENT

This instruction has been modified for this edition to allow for prevention of performance, imposition of additional burden, or expense of performance claims based on the evidence presented during trial.

This instruction is based upon the court's formulation in Pacific Northwest Shooting Park Association v. City of Sequim, 158 Wn.2d 342, 351, 144 P.3d 276 (2006):

A party claiming tortious interference with a contractual relationship or business expectancy must prove five elements:

> (1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage.

See also Leingang v. Pierce Cnty. Med. Bureau, 131 Wn.2d 133, 157, 930 P.2d 288 (1997); Commodore v. Univ. Mech. Contractors, Inc., 120 Wn.2d 120, 137, 839 P.2d 314 (1992); Moore v. Com. Aircraft Interiors, LLC, 168 Wn.App. 502, 508–09, 278 P.3d 197 (2012).

Tortious inducement of breach of a contract is a cause of action separate and distinct from tortious prevention of performance of a contract or increasing the burden or expense of performance. Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Local Union No. 174, __ Wn.2d. __, 500 P.3d 119, 137–38 (2021) (citing Restatement (Second) of Torts § 766A (1979)); see also Eserhut v. Heister, 52 Wn.App. 515, 518, 762 P.2d 6 (1988); Pacific Typesetting Co. v. Int'l Typographical Union, 125 Wash. 273, 216 P. 358 (1923).

Valid contract. A contract may be valid, and therefore provide the basis for a tortious interference with contract claim, even though it is

voidable. See Restatement (Second) of Torts § 766, cmt. f (1979). Similarly, there may be a cause of action for interference with contract, even though the contract is terminable at will. Restatement (Second) of Torts § 766 cmt. g (1979); cf. Calbom v. Knudtzon, 65 Wn.2d 157, 396 P.2d 148 (1964) (discussing termination of contract that is terminable at will as interference with business expectancy). But see Woody v. Stapp, 146 Wn.App. 16, 24, 189 P.3d 807 (2008) ("Generally, at-will employees do not have a business expectancy in continued employment.").

A plaintiff must show that the interferer was an intermeddling third party; a party to the relationship cannot be held liable for tortious interference. Houser v. City of Redmond, 91 Wn.2d 36, 39, 586 P.2d 482 (1978); Vasquez v. State, 94 Wn.App. 976, 989, 974 P.2d 348 (1999).

If there is no valid contract between the plaintiff and a third party, the plaintiff may still have a valid cause of action for intentional interference with business expectancy. Scymanski v. Dufault, 80 Wn.2d 77, 491 P.2d 1050 (1971).

If the agreement is invalid or void because it is illegal or contrary to public policy, a defendant will not be liable for preventing its performance. Restatement (Second) of Torts § 774 (1979); see also Davidson v. Hensen, 135 Wn.2d 112, 128–29 n.7, 954 P.2d 1327 (1998) (distinguishing statutory violations that void an agreement from those that merely render an agreement unenforceable).

Knowledge. Although knowledge of the existence of a contract, or business relationship, is an essential element of tortious interference, "it is sufficient if the evidence reveals that the alleged interferer had knowledge of facts giving rise to the existence of the relationship. It is not necessary that the interferer understood the legal significance of such facts." Calbom, 65 Wn.2d at 165. The alleged interferer must have had such knowledge at the time of the interfering conduct. Fisher v. Parkview Props, Inc., 71 Wn.App. 468, 479, 859 P.2d 77 (1993); see also Roger Crane & Assocs. v. Felice, 74 Wn.App. 769, 778, 875 P.2d 705 (1994).

Intentional interference. The plaintiff must show that the interference was intentional. White River Ests. v. Hiltbruner, 134 Wn.2d 761, 768, 953 P.2d 796 (1998); Woody, 146 Wn.App. at 23. The rule may apply not only to situations in which the interference is a primary purpose of the interferer, but also to situations "in which the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his action." Restatement (Second) of Torts § 766 cmt. j (1979). The incidental nature of the interference may, however, be taken into account in determining whether the conduct was improper.

Improper purpose or improper means. The plaintiff has the burden of proving improper purpose or improper means as part of the plaintiff's burden since Pleas v. City of Seattle, 112 Wn.2d 794, 774 P.2d 1158 (1989). See also Moore, 168 Wn.App. at 509 ("[O]ur Supreme Court definitely added the element of improper purpose or means to the plaintiff's prima facie burden . . ."); Koch v. Mut. of Enumclaw Ins. Co., 108 Wn.App. 500, 506–07, 31 P.3d 698 (2001) (placing burden on plaintiff to show that doctor's advice was dishonest or offered in bad faith); WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions) and its Comment.

Affirmative defense issues in this context have not been addressed in Washington. The Restatement (First) of Torts treated a number of circumstances or categories of conduct on the part of defendants as matters of privilege or justification. See Restatement (First) of Torts §§ 768–73 (1939); see also the examples cited in the Comment to WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions). The Restatement (Second) of Torts, however, analyzes most of the same situations and categories of conduct as matters of proper or improper conduct. Restatement (Second) of Torts §§ 768–73 (1979).

In *Pleas*, the court made proof of improper interference part of the plaintiff's case, but also held that "matters of privilege and justification continue to be affirmative defenses to be raised by the defendant." Pleas, 112 Wn.2d at 804. The WPI Committee has therefore included proof of improper purpose or improper means in this instruction, while setting forth such matters as legally protected interest, financial interest, or competition as defenses in WPI 352.04–.06.

Damages. Damages based on a claim of tortious interference may include not only economic loss but also damages for mental anguish, and for discomfort and inconvenience. Cherberg v. Peoples Nat'l Bank, 88 Wn.2d 595, 602, 564 P.2d 1137 (1977). The plaintiff must "tie . . . losses to *specific relationships*" between the plaintiff and "identifiable third parties." Pac. Nw. Shooting Park, 158 Wn.2d at 352–53 (emphasis in original).

Such damages must be actually caused by the interference. Sea-Pac Co. v. United Food & Com. Workers, 103 Wn.2d 800, 805, 699 P.2d 217 (1985).

In a case involving termination of plaintiff's contract for professional services, the proper measure of damages was the value of the business expectancy interfered with, and the defendant had the burden of offering evidence bearing on any claimed off-set for costs involved in performance. Calbom, 65 Wn.2d at 166–67.

Cross-reference. An extended discussion of tortious interference can be found in DeWolf & Allen, 16A Washington Practice, Tort Law and Practice §§ 23:2–:6 (5th ed.).

[Current as of December 2021.]

WPI 352.01.01

TORTIOUS INTERFERENCE WITH CONTRACT—BURDEN OF PROOF ON THE ISSUES—WITH AFFIRMATIVE DEFENSES

To recover on a claim of tortious interference with contract, (name of plaintiff) **has the burden of proving each of the following propositions:**

(1) That at the time of the conduct at issue, (name of plaintiff) **was a party to a valid contract with** (name of contracted party) **[to** (state purpose of contract)**];**

(2) That (name of defendant) **knew of the existence of that contract;**

(3) That (name of defendant) **[intentionally induced or caused** (name of contracted party) **to breach the contract with** (name of plaintiff)**] [prevented** (name of plaintiff)**'s performance of the contract] [caused** (name of plaintiff)**'s performance to be more expensive or burdensome];**

(4) That (name of defendant)**'s interference was for an improper purpose or by improper means, as defined later in these instructions; and**

(5) That the conduct of (name of defendant) **was a proximate cause of damages to** (name of plaintiff).

To establish a defense of (identify affirmative defense), (name of defendant) **has the burden of proving the following proposition(s):**

(Here set forth the necessary elements of any affirmative defenses at issue.)

If you find from your consideration of all the evidence that (name of plaintiff) **has established each of the elements of**

the tortious interference claim, and (name of defendant) **has not established the elements of** (identify affirmative defense), **then your verdict should be for** (name of plaintiff). **On the other hand, if one or more of the elements of tortious interference claim has not been proved, or if** (name of defendant) **has established the elements of** (identify affirmative defense), **then your verdict should be for** (name of defendant).

NOTE ON USE

This instruction is designed for use in a tortious interference with contract case with affirmative defenses. For a tortious interference with contract case without an affirmative defense use WPI 352.01 (Tortious Interference with Contract—Burden of Proof on the Issues—No Affirmative Defense) instead of this instruction. See the Note on Use to WPI 352.02 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense) for discussion of instructions for a case based on tortious interference with a business relationship or expectancy that has not ripened into a contract.

Use bracketed material as applicable. Use the bracketed phrase about inducement or causation of breach of contract when it is supported by the evidence. Use the bracketed phrases about prevention of performance or imposition of additional burden or expense of performance when they are supported by the evidence.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof) and with an instruction defining proximate cause—WPI 15.01 (the traditional instruction) or WPI 15.01.01 (the alternative instruction).

Use this instruction with WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions) and WPI 352.04 (Tortious Interference with Contract—Affirmative Defense—Legally Protected Interest) when appropriate to the case.

Do not use this instruction with WPI 352.05 (Tortious Interference with Business Expectancy—Affirmative Defense—Competition) or WPI 352.06 (Tortious Interference with Business Expectancy—Affirmative Defense—Financial Interest).

If the alleged interference is with a contract that is terminable at will, use WPI 352.02 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense) or WPI 352.02.01 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—With Affirmative Defenses), instead of this instruction. See

the Comment to WPI 352.02 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense).

COMMENT

This instruction has been modified for this edition to allow for prevention of performance, imposition of additional burden, or expense of performance claims based on the evidence presented during trial.

See the Comment to WPI 352.01 (Tortious Interference with Contract—Burden of Proof on the Issues—No Affirmative Defense) regarding the plaintiff's burden.

The Washington Supreme Court in Pleas v. City of Seattle, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989), held that "matters of privilege and justification continue to be affirmative defenses to be raised by the defendant." See also Moore v. Com. Aircraft Interiors, LLC, 168 Wn. App, 502, 509, 278 P.3d 197 (2012) ("Only after the plaintiff establishes the five elements of the tort does the burden shift to the defendant to show, as an affirmative defense, that its interference was either privileged or justified.").

With regard to the defendant's burden, and whether matters should be treated as affirmative defenses or an aspect of improper interference, see the Comments to WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions) and WPI 352.04 (Tortious Interference with Contract—Affirmative Defense—Legally Protected Interest).

An extended discussion of tortious interference can be found in DeWolf & Allen, 16A Washington Practice, Tort Law and Practice §§ 23:2–:6 (5th ed.).

[Current as of December 2020.]

WPI 352.02

TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY—BURDEN OF PROOF ON THE ISSUES—NO AFFIRMATIVE DEFENSE

To recover on a claim of tortious interference with business [relationship] [or] [expectancy], (name of plaintiff) has the burden of proving each of the following propositions:

(1) That at the time of the conduct at issue, (name of plaintiff) had a business [relationship] [or] [expectancy] with a probability of future economic benefit for (name of plaintiff);

(2) That (name of defendant) knew of the existence of that business [relationship] [or] [expectancy];

(3) That (name of defendant) intentionally induced or caused the termination of the business [relationship] [or] [expectancy];

(4) That (name of defendant)'s interference was for an improper purpose or by improper means, as defined later in these instructions; and

(5) That the conduct of (name of defendant) was a proximate cause of damages to (name of plaintiff).

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for (name of defendant) [on this claim].

NOTE ON USE

In a tortious interference case that does not involve inducing or causing breach of a valid contract, use this instruction, rather than WPI 352.01 (Tortious Interference with Contract—Burden of Proof on the Is-

sues—No Affirmative Defense). If there are affirmative defenses, use WPI 352.02.01 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—With Affirmative Defenses) instead of this instruction.

Use the applicable bracketed phrase or phrases. If a contract terminable at will is involved, use "relationship" rather than "expectancy."

Use this instruction with WPI 21.01 (Meaning of Burden of Proof) and with an instruction defining proximate cause—WPI 15.01 (the traditional instruction) or WPI 15.01.01 (the alternative instruction).

When appropriate to the facts of the case, this instruction may be used with WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions).

COMMENT

If defendant has interfered in a business relationship between plaintiff and a third party that does not involve a valid contract, the plaintiff may still have a valid cause of action for intentional interference with business expectancy. Scymanski v. Dufault, 80 Wn.2d 77, 84–85, 491 P.2d 1050 (1971).

Prospective contractual relationships, other than contracts to marry, are protected against intentional interference when the potential contract would be of pecuniary advantage to the plaintiff. For example, interference with the prospect of obtaining employment or an employee, or the opportunity to sell or buy land, services, or chattel, may be actionable. Scymanski, 80 Wn.2d at 83–84 (citing Restatement (First) of Torts § 766A (1939)). "All that is needed is a relationship between parties contemplating a contract, with at least a reasonable expectation of fruition." Scymanski, 80 Wn.2d at 84–85.

The plaintiff "must show that the future opportunities and profits are a reasonable expectation and not based on merely wishful thinking." Sea-Pac Co. v. United Food & Com. Workers Local Union 44, 103 Wn.2d 800, 805, 699 P.2d 217 (1985).

The business expectancy must be valid, or legitimate. Thus, in a situation in which a contract is void for violation of public policy, an action based on business expectancy will be defeated. Davidson v. Hensen, 135 Wn.2d 112, 128–29 n.7, 954 P.2d 1327 (1998) (distinguishing statutory violations that void an agreement from those that merely render an agreement unenforceable); see Murray Publ'g Co. v. Malmquist, 66 Wn.App. 318, 832 P.2d 493 (1992) (burden on defendant to show busi-

ness expectancy would constitute unlawful restraint of trade). Cf. Restatement (Second) of Torts § 774 (1979); Restatement (First) of Torts § 774 (1939).

To establish a valid business expectancy, the plaintiff may show "something less than an enforceable contract." Greensun Grp., LLC v. City of Bellevue, 7 Wn.App.2d 754, 768, 436 P.3d 397 (2019), review denied 193 Wn.2d 1023 (2019). "[A] 'valid business expectancy includes any prospective contractual or business relationship that would be of pecuniary value.' " Greensun, 7 Wn. App.2d at 768 (quoting Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group. Inc., 114 Wn. App. 151, 158, 52 P.3d 30 (2002)). This includes "an opportunity to obtain *prospective customers*." Greensun, 7 Wn.App.2d at 768 (emphasis in original) (quoting Caruso v. Local Union No. 690, 33 Wn.App. 201, 207, 653 P.2d 638 (1982), reversed on other grounds, 100 Wn.2d 343, 670 P.2d 240 (1983)).

With the exception of the analysis of what constitutes proper or improper interference, or the related applicability of defenses such as competition or financial interest, recent Washington cases usually do not distinguish between tortious interference with contract and tortious interference with business expectancy or relationships in their analysis of the remaining elements. See the Comment to WPI 352.01 (Tortious Interference with Contract—Burden of Proof on the Issues—No Affirmative Defense) for comments on elements (2) through (5), and the question of whether matters are properly analyzed as issues of proper or improper conduct, or affirmative defenses.

Cross-reference. An extended discussion of tortious interference can be found in DeWolf & Allen, 16A Washington Practice, Tort Law and Practice §§ 23:2–:6 (5th ed.).

[Current as of January 2021.]

WPI 352.02.01

TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY—BURDEN OF PROOF ON THE ISSUES—WITH AFFIRMATIVE DEFENSES

To recover on a claim of tortious interference with business [relationship] [or] [expectancy], (name of plaintiff) has the burden of proving each of the following propositions:

(1) That at the time of the conduct at issue, (name of plaintiff) had a business relationship or expectancy with a probability of future economic benefit for (name of plaintiff);

(2) That (name of defendant) knew of the existence of that business [relationship] [or] [expectancy];

(3) That (name of defendant) intentionally induced or caused the termination of the business [relationship] [or] [expectancy];

(4) That (name of defendant's) interference was for an improper purpose or by improper means, as defined later in these instructions;

(5) That the conduct of (name of defendant) was a proximate cause of damages to (name of plaintiff).

To establish a defense of (identify affirmative defense), (name of defendant) has the burden of proving the following propositions:

(Here set forth the necessary elements of any affirmative defenses at issue.)

If you find from your consideration of all the evidence that (name of plaintiff) has established each of the elements of the tortious interference claim, and (name of defendant) has not established the elements of (identify affirmative defense), then your

verdict should be for (name of plaintiff). On the other hand, if one or more of the elements of tortious interference claim has not been proved, or if (name of defendant) has established the elements of (identify affirmative defense), then your verdict should be for (name of defendant).

NOTE ON USE

In a tortious interference case that does not involve inducing or causing breach of a valid contract, use this instruction, rather than WPI 352.01 (Tortious Interference with Contract—Burden of Proof on the Issues—No Affirmative Defense). If there are no affirmative defenses, use WPI 352.02 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense), instead of this instruction.

Use this instruction with WPI 21.01 (Meaning of Burden of Proof) and with an instruction defining proximate cause—WPI 15.01 (the traditional instruction) or WPI 15.01.01 (the alternative instruction).

When appropriate to the facts of the case, this instruction may be used with WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions), WPI 352.05 (Tortious Interference with Business Expectancy—Affirmative Defense—Competition), or WPI 352.06 (Tortious Interference with Business Expectancy—Affirmative Defense—Financial Interest).

COMMENT

See the Comment to WPI 352.02 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—No Affirmative Defense) regarding the plaintiff's burden.

The Washington Supreme Court held in Pleas v. City of Seattle, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989), that "matters of privilege and justification continue to be affirmative defenses to be raised by the defendant."

> The basic issue raised by the assertion of the defense is whether, under the circumstances of the particular case, the interferor's conduct is justifiable, bearing in mind such factors as the nature of the interferor's conduct, the character of the expectancy with which the conduct interferes, the relationship between the various parties, the interest sought to be advanced by the interferor, and the social desirability of protecting the expectancy or the interferor's freedom of action.

Calbom v. Knudtzon, 65 Wn.2d 157, 163, 396 P.2d 148 (1964).

With regard to the defendant's burden, and whether matters should be treated as affirmative defenses or an aspect of improper interference, see the Comments to WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions), WPI 352.05 (Tortious Interference with Business Expectancy—Affirmative Defense—Competition), and WPI 352.06 (Tortious Interference with Business Expectancy—Affirmative Defense—Financial Interest).

An extended discussion of tortious interference can be found in another volume of Washington Practice. See DeWolf & Allen, 16A Washington Practice, Tort Law and Practice §§ 23:2–:6 (5th ed.).

[Current as of December 2020.]

WPI 352.03

TORTIOUS INTERFERENCE—IMPROPER PURPOSE—IMPROPER MEANS—DEFINITIONS

["Interference for improper purpose" is interference with an intent to harm (name of plaintiff).]

["Interference by improper means" is interference that violates a statute, a regulation, a recognized rule of common law, or an established standard of the trade or profession.]

NOTE ON USE

Use the bracketed paragraph(s) applicable to the facts of a particular case.

This instruction will frequently be expanded, based on case law or relevant provisions of the Restatement (Second) of Torts § 767 (1979), as appropriate to the facts of a given case. See the Comment below.

In a tortious interference with contract case, this instruction may be combined with WPI 352.04 (Tortious Interference with Contract—Affirmative Defense—Legally Protected Interest). In a tortious interference with business expectancy case, this instruction may also be combined with WPI 352.05 (Tortious Interference with Business Expectancy—Affirmative Defense—Competition) or WPI 352.06 (Tortious Interference with Business Expectancy—Affirmative Defense—Financial Interest).

When the second paragraph is used, an additional instruction should be drafted to set forth the appropriate statute, regulation, common law rule, or established standard of the trade or profession.

COMMENT

In Pleas v. City of Seattle, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989), the court held that "plaintiff must show not only that the defendant intentionally interfered with his business relationship, but also that the defendant had a 'duty of non-interference'; i.e., that he interfered for an improper purpose . . . or . . . used improper means . . . ." See also Moore v. Com. Aircraft Interiors, LLC, 168 Wn.App. 502, 510, 278 P.3d 197 (2012); Eugster v. City of Spokane, 121 Wn.App. 799, 811, 91 P.3d 117 (2004).

Interference alone is not enough. Moore, 168 Wn. App. at 509. To be improper, interference must be wrongful by some measure beyond the fact of the interference itself, such as a statute, regulation, recognized rule of common law, or an established standard of trade or profession. Moore, 168 Wn.App. at 510.

An instruction incorporating the first paragraph was cited with approval in Westmark Development Corp. v. City of Burien, 140 Wn.App. 540, 558, 166 P.3d 813 (2007) (trial court properly entered judgment on jury verdict finding tortious interference).

According to the Restatement (Second) of Torts section 767, in "determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given" to the following factors:

(a) the nature of the actor's conduct;

(b) the actor's motive;

(c) the interests of the other with which the actor's conduct interferes;

(d) the interests sought to be advanced by the actor;

(e) the societal interests in protecting the freedom of action of the actor and the contractual interests of the other;

(f) the proximity or remoteness of the actor's conduct to the interference; and

(g) the relations between the parties.

Restatement (Second) of Torts § 767 (1979).

In 2005, the ABA proposed a general instruction setting forth the factors above for the jury's consideration. Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury Instructions: Business Torts Litigation § 2.7 (4th ed. 2005). However, the WPI Committee is of the view that such an instruction is too vague to provide helpful guidance, and suggests instead an instruction tailored to the claims of the case.

With regard to improper purpose, in *Pleas* the court used the formulation of "an improper objective of harming the plaintiff." Pleas, 112 Wn.2d at 803–04 (citing Top Serv. Body Shop, Inc. v. Allstate Ins. Co., 283 Or. 201, 582 P.2d 1365 (1978)). See also Westmark, 140 Wn.App. at 558. To the extent that such a purpose may be justified or privileged,

the defendant may have an affirmative defense, such as those set forth in WPI 352.04 (Tortious Interference with Contract—Affirmative Defense—Legally Protected Interest), WPI 352.05 (Tortious Interference with Business Expectancy—Affirmative Defense—Competition), or WPI 352.06 (Tortious Interference with Business Expectancy—Affirmative Defense—Financial Interest).

Improper purpose or motive was also examined in Cherberg v. Peoples National Bank, 88 Wn.2d 595, 605, 564 P.2d 1137 (1977), in which the court held that the defendant-lessor could be sued by the plaintiff-lessee for tortious interference with business expectancy, even though the lessor's conduct also constituted a breach of the lease agreement. The court stated:

> Tort liability . . . can properly be imposed, as it is here, when the evidence adequately establishes the underlying motive for the intentional breach by the lessor was not the economic viability of the lessor's investment, in its present state, but rather was economic considerations outside the scope of the parties' obligations under their existing agreement.
>
> A party to a lease or contract should not be held liable in tort for a willful breach of an agreement which it is no longer economically feasible for the parties to respect . . . [But here there is] evidence in the record from which the jury could have inferred the lessor used the [unrepaired] condition of the wall as a means to oust the petitioners and gain possession of the leased premises in order that the lessor might put those premises to a different and perhaps considerably more profitable use. Proof of a breach based upon such a motive demonstrates a failure to make a good faith effort to meet obligations under the lease and may give rise to liability in tort.

Cherberg, 88 Wn.2d at 605; see also Schmerer v. Darcy, 80 Wn.App. 499, 910 P.2d 498 (1996) (trial court properly dismissed claim for tortious interference when lienholder was seeking to protect legitimate interest).

The definition of "improper means" in the instruction is based upon the statement in Pleas v. City of Seattle, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989): "Interference can be 'wrongful' by reason of a statute or other regulation, or a recognized rule of common law, or an established standard of trade or profession." Whether the conduct is lawful is a question for the court. Thereafter, the question of whether surrounding circumstances justify the conduct, and the existence of such circumstances, are questions of fact for the jury. Restatement (Second) of Torts § 767 cmt. l (1979).

Improper means also have been described as including physical violence, fraudulent misrepresentation, or threats of illegal conduct. Restatement (Second) of Torts § 767 cmt. c (1979). Improper means also include a city's enforcement of an ordinance that had been invalidated by a court order. Sintra, Inc. v. City of Seattle, 119 Wn.2d 1, 829 P.2d 765 (1992).

Threatening to file a lawsuit may constitute an interference by improper means when the interferor "has no belief in the merit of the litigation" or threatens litigation "only to harass the third parties and not to bring his claim to definitive adjudication." Moore, 168 Wn.App. at 509 (quoting Restatement (Second) of Torts § 767 cmt. c (1979)). For example, threatening to file a lawsuit may constitute an interference for an improper purpose if, the interferor is acting out of ill will, greed, retaliation, or hostility or is motivated by an intent to harm the plaintiff. Moore, 168 Wn.App. at 509 (citing Restatement (Second) of Torts § 767 cmt. d (1979)).

In addition, the Restatement (Second) of Torts contains a number of specific rules defining various actions or motives as "proper" or "improper." See, e.g., Restatement (Second) of Torts §§ 768–73 (1979). In the Restatement (First) of Torts, however, the same actions were analyzed as "privileges." See Restatement (First) of Torts §§ 768–73 (1939).

According to Pleas v. City of Seattle, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989), even though proof of improper purpose or improper means is now part of the plaintiff's prima facie case, "matters of privilege or justification continue to be affirmative defenses to be raised by the defendant." Pleas, 112 Wn.2d at 804. Some of those matters that were formerly considered privileges in the Restatement are therefore presented as defenses, see WPI 352.05 (Tortious Interference with Business Expectancy—Affirmative Defense—Competition) or WPI 352.06 (Tortious Interference with Business Expectancy—Affirmative Defense—Financial Interest).

[Current as of December 2020.]

WPI 352.04

TORTIOUS INTERFERENCE WITH CONTRACT—AFFIRMATIVE DEFENSE—LEGALLY PROTECTED INTEREST

(Name of defendant) claims that [he] [she] [it] acted to protect a legal right.

If you find that (name of defendant) has proved that [he] [she] [it] acted in good faith to protect, by proper means, a legal right of (name of defendant), such as (name of defendant)'s [property] [contractual] [(describe other)] interest, then (name of defendant)'s conduct in inducing the breach of contract between (name of plaintiff) and (name of breaching party) was proper.

If you find, however, that (name of defendant) acted merely in pursuit of a potential future advantage, not yet realized, then the defendant was not protecting a legal right.

NOTE ON USE

In a tortious interference with contract case, use this instruction with WPI 352.01.01 (Tortious Interference with Contracts—Burden of Proof on the Issues—With Affirmative Defenses) and WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions) when warranted by the evidence.

COMMENT

The instruction was approved in Deep Water Brewing, LLC v. Fairway Resources Ltd., 152 Wn.App. 229, 215 P.3d 990 (2009). With respect to the interests of the defendant, see Restatement (Second) of Torts § 767 cmts. d, f (1979); 44B Am.Jur.2d Interference § 29 (2017).

According to the Restatement (Second) of Torts section 773:

> One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

Restatement (Second) of Torts § 773 (1979).

Though the wording of the Restatement (Second) suggests that the issue should be treated as a definition of "improper," assertion of a "bona fide claim" was a justification or privilege under the Restatement (First) of Torts section 773. Pursuant to Pleas v. City of Seattle, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989), the issue should be treated as an affirmative defense. See also Deep Water, 152 Wn.App. at 263 (good faith is treated as a matter of privilege or justification to be raised as an affirmative defense by the defendant); see generally the Comment to WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions).

Washington courts concur that "one who in good faith asserts a legally protected interest of his own that he believes may be impaired by the performance of a contract between others is not guilty of tortious interference." Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 375, 617 P.2d 704 (1980); Greensun Grp., LLC v. City of Bellevue, 7 Wn.App.2d 754, 777, 436 P.3d 397 (2019); Roy v. Cunningham, 46 Wn.App. 409, 416, 731 P.2d 526 (1986); see also Olympic Fish Prods., Inc. v. Lloyd, 93 Wn.2d 596, 611 P.2d 737 (1980) (corporate officer, acting in good faith, i.e., with intent to benefit the corporation, not liable for inducing corporation to violate contract); Moore v. Com. Aircraft Interiors, LLC, 168 Wn.App. 502, 512, 278 P.3d 197 (2012) ("Exercising in good faith one's legal interests is not improper interference."); Schmerer v. Darcy, 80 Wn.App. 499, 910 P.2d 498 (1996) (trial court properly dismissed claim for tortious interference when lienholder was seeking to protect legitimate interest). Such a showing, where unrebutted, is dispositive. Moore, 168 Wn.App. at 511 (citing Brown, 94 Wn.2d at 375).

Similarly, if two parties have separate contracts with a third party, "each may resort to any legitimate means at his disposal to secure performance of his contract even though the necessary result will be to cause a breach of the other contract." Dauphin v. Smith, 42 Wn.App. 491, 495, 713 P.2d 116 (1986); see also DeWolf & Allen, 16A Washington Practice, Tort Law and Practice § 23.8 (5th ed.).

When the defendant's interest is merely one of prospective economic advantage, not yet realized, the defendant has no such justification. Deep Water, 152 Wn.App. at 264. Thus, there is a clear distinction between prospective and current interests, and only interference based upon the latter is considered justified.

With regard to financial interests in the affairs of others, see Restatement (Second) of Torts § 769 cmt. b (1979), which provides that a defendant having a financial interest in the business of the person

induced is automatically shielded from liability, provided that the defendant does not employ wrongful means and acts to protect his own interests. This automatic immunity, however, applies only to the tort of interference with prospective economic advantage, and not to the tort of inducing breach of contract.

Competition does not justify a competitor's inducing a breach of plaintiff's existing contract; under certain circumstances, however, competition can justify interfering with plaintiff's business expectancies, including plaintiff's existing contracts terminable at will. See Restatement (Second) of Torts § 768 (1979). See further discussion in the Comment to WPI 352.05 (Tortious Interference with Business Expectancy—Affirmative Defense—Competition).

For a list of other defenses enumerated by the second Restatement, see the Comment to WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions).

[Current as of March 2021.]

WPI 352.05

TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY—AFFIRMATIVE DEFENSE—COMPETITION

(Name of defendant) **claims that [his] [her] [its] conduct was justified because it occurred during the course of competition between** (name of defendant) **and** (name of plaintiff).

To establish the defense of competition, (name of defendant) **has the burden of proving each of the following propositions:**

(1) That the conduct of (name of defendant) **related to competition between** (name of defendant) **and** (name of plaintiff) **for the business of** (name of third party)**;**

(2) That (name of defendant)**'s purpose was, at least in part, to advance** (name of defendant)**'s interest in competing with** (name of plaintiff)**, and was not motivated solely by bad faith or ill will; and**

(3) That (name of defendant) **did not use wrongful means to compete.**

NOTE ON USE

Use this instruction with WPI 352.02.01 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—With Affirmative Defense) in a tortious interference with business expectancy case, when warranted by the evidence. Do not use this instruction in a tortious interference with contract case, unless it is a contract terminable at will.

COMMENT

According to Pleas v. City of Seattle, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989), even though proof of improper purpose or improper means is now part of the plaintiff's prima facie case, "matters of privilege or justification continue to be affirmative defenses to be raised by the defendant." Traditionally, such privileges and justifications have

included competition. See Restatement (First) of Torts § 768 (1939); Island Air, Inc. v. LaBar, 18 Wn.App. 129, 145, 566 P.2d 972 (1977) (trial court properly awarded damages for tortious interference when competitor's use of confidential information constituted improper means). For a list of other such privileges as set forth in the Restatement, see the Comment to WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions).

Competition is one of the most frequently raised defenses. The elements are set out in Island Air, Inc. v. LaBar, 18 Wn.App. 129, 142, 566 P.2d 972 (1977), drawing from the Restatement (First) of Torts § 768 (1939):

> § **768.** Privilege of Competitor.
>
> (1) One is privileged purposely to cause a third person not to enter into or continue a business relation with a competitor of the actor if:
>
> (a) the relation concerns a matter involved in the competition between the actor and the competitor, and
>
> (b) the actor does not employ improper means, and
>
> (c) the actor does not intend thereby to create or continue an illegal restraint of competition, and
>
> (d) the actor's purpose is at least in part to advance his interest in his competition with the other.

The defense of justification or privilege on the basis of competition is only available if the conduct constituting the interference is not unlawful. Conduct that is unlawful can never fit the description of being "justified" or "privileged." If the plaintiff challenges the legality of the defendant's conduct, the question is one for the court rather than the jury. If the court determines that the conduct was not unlawful, then it remains for the jury to determine whether the surrounding circumstances justify the conduct. Restatement (Second) of Torts § 767 cmt. l (1979). The WPI Committee follows the formulation of the Restatement (Second) by including the absence of wrongful means in the affirmative defense, even though proof of wrongful means is now, following *Pleas*, also a part of the plaintiff's prima facie case.

See also WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions) and its Comment.

[Current as of December 2020.]

WPI 352.06

TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY—AFFIRMATIVE DEFENSE—FINANCIAL INTEREST

(Name of defendant) claims that even if [his] [her] [its] conduct interfered with (name of plaintiff)'s prospective business relationship or future contract, that conduct was justified because (name of defendant) was acting reasonably to protect [his] [her] [its] financial interest from being harmed.

To establish the defense of financial interest, (name of defendant) has the burden of proving each of the following propositions:

(1) That prior to any conduct of (name of defendant) interfering with a business relationship or future contract of (name of plaintiff), (name of defendant) had a financial interest connected to (describe the plaintiff's prospective relationship); and

(2) That (name of defendant) did not use wrongful means to protect that interest from harm.

NOTE ON USE

Use this instruction with WPI 352.02.01 (Tortious Interference with Business Expectancy—Burden of Proof on the Issues—With Affirmative Defenses) in an appropriate case. Do not use this instruction in a tortious interference with contract case, unless it is a contract terminable at will.

This instruction may be modified if the interest sought to be protected is better described as legal rather than financial. See the Comment below.

COMMENT

The instruction is derived from a jury instruction proposed by the ABA. Nelson & Fisher, Am. Bar Ass'n Section of Litigation, Model Jury

Instructions: Business Torts Litigation § 2.9.3 (4th ed. 2005). In light of the wording of related sections from the Restatement (Second), the second element requires proof that wrongful means were not used, rather than proof of "reasonable" conduct as suggested by the ABA model instruction. See Restatement (Second) of Torts §§ 769, 771 (1979). See also Calbom v. Knudtzon, 65 Wn.2d 157, 163, 396 P.2d 148 (1964); Quadra Enterprises v. R. A. Hanson Co., 35 Wn.App. 523, 529 n.3, 667 P.2d 1120 (1983).

For an analogous issue, see Restatement (Second) of Torts § 773 (1979). It has been held that even if all other elements of a cause of action for tortious interference with business expectancy are present, "interference is justified as a matter of law if the interferer has engaged in the exercise of an absolute right equal or superior to the right which was invaded." Plumbers & Steamfitters Union Local 598 v. Wash. Pub. Power Supply Sys., 44 Wn.App. 906, 920, 724 P.2d 1030 (1986) (interferer's right to protect its own property from trespass justified interference with business expectancy). This high standard must be met only when the privilege is asserted to exist as a matter of law, rather than as a question of disputed fact. Dauphin v. Smith, 42 Wn.App. 491, 495 n.3, 713 P.2d 116 (1986).

For a comparable analysis of the privilege of a public official or employee to act within the scope of statutory duties, see Stidham v. Dep't of Licensing, 30 Wn.App. 611, 614–15, 637 P.2d 970 (1981) (privilege to invade plaintiff's interest in furtherance of a social interest of greater public import).

See the Comment to WPI 352.03 (Tortious Interference—Improper Purpose—Improper Means—Definitions) for a discussion of affirmative defenses and their relation to proper or improper conduct.

[Current as of December 2020.]

PART XIX

INVOLUNTARY TREATMENT

CHAPTER 360

BEHAVIORAL HEALTH DISORDERS

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WPI 360.00

INTRODUCTION

The Legislature amended RCW 71.05 et seq. to collectively refer to mental illness and substance abuse as behavioral health disorders. See Laws of 2020, Chapter 302, § 41.

Behavioral health commitment proceedings are civil in nature. In re McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984). They are governed by RCW Chapter 71.05 and, if applicable, by the Superior Court Mental Proceedings Rules (MPR) (although many of these court rules address non-jury issues).

These instructions are to be used in trials for 90-day and 180-day involuntary commitments. These instructions are not intended for use in proceedings for 14-day commitments or in proceedings for the civil commitment of sexual predators under RCW Chapter 71.09.

[Current as of January 2021.]

WPI 360.01

ADVANCE ORAL INSTRUCTION—BEHAVIORAL HEALTH DISORDER—INVOLUNTARY TREATMENT—INTRODUCTORY

Part 1—Before Prospective Jurors are Questioned:

This trial is to determine whether a person should be required to involuntarily receive treatment because of a behavioral health disorder. The first stage of the trial is the jury selection, which is sometimes called voir dire.

The purpose of this process is to make sure that we select a jury that is free from any outside or pre-existing bias that might interfere with the jury's ability to fairly decide the case based on the evidence and the law that you receive in this courtroom.

You have already met [Mr.] [Ms.] (name), our court bailiff. The bailiff's job is to assist you. If there is anything we can do to better accommodate you as a juror, please let the bailiff know. The bailiff will involve me if that is necessary. Please follow any instructions that [he] [she] gives you.

The court clerk is [Mr.] [Ms.] (name). The clerk's job is to mark and handle exhibits and other significant papers.

[The court reporter is [Mr.] [Ms.] (name). It is the court reporter's job to take verbatim notes of the proceedings.]

[In this courtroom we record all proceedings with a [video] [audio] recording system. All of the proceedings are preserved to create a "court record."]

This case was commenced by the filing of a petition by (name of petitioner). The petitioner is represented by (name of counsel). The petition was filed against (name of respondent), who is represented by (name of counsel).

The petition alleges that the respondent, (identify respondent), has a behavioral health disorder requiring involuntary treatment. [The petition further alleges that involuntary treatment is required because the respondent presents a [a likelihood of serious harm] [is gravely disabled] [has been determined to be incompetent on felony charges, criminal charges have been dismissed, has committed acts constituting acts constituting a felony, and has a substantial likelihood of committing similar felony acts] [has previously been determined to have been found incompetent on felony criminal charges and committed acts constituting a felony and the petition alleges that the respondent continues to present a likelihood of committing similar felony acts] and/or [is in need of assisted outpatient treatment]].

It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender, or disability of any party, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial. These are called "conscious biases"—and, when answering questions, it is important, even if uncomfortable for you, to share these views with the lawyers.

However, there is another more subtle tendency at work that we must all be aware of. This part of human nature is understandable but must play no role in your service as jurors. In our daily lives, there are many issues that require us to make quick decisions and then move on. In making these daily decisions, we may well rely upon generalities, even what might be called biases or prejudices. That may be appropriate as a coping mechanism in our busy daily lives but bias and prejudice can play no part in any decisions you might make as a juror. Your decisions as jurors must be based solely upon an open-minded, fair consideration of the evidence that comes before you during trial.

In a moment, I am going to ask you some background questions and the lawyers will also have a chance to follow up with some questions of their own. Most importantly, you are to look within yourselves and see if there is anything there in your life experiences or your personal beliefs that might be such a strong influence that it would overcome your ability to serve as a fair and impartial juror. These questions may sometimes involve issues that are sensitive for you. If you are uncomfortable answering any particular question in front of the other jurors, please let me know or notify the [bailiff] [(insert other appropriate staff person)]. We may then discuss other ways to handle this question.

Before any questions are asked, an oath or affirmation will be administered. All of your answers must be open, honest, and forthright. At this time, I ask that you please rise, raise your right hand, and [I] [the clerk] will administer this oath.

> "Do you solemnly swear or affirm that you will truthfully answer such questions as may be asked of you by the court or the attorneys concerning your qualifications to act as jurors in this case? [Please respond.]"

The fact that a petition has been filed is not to be considered by you as any indication of the truth of the allegations contained in that petition.

(Identify petitioner), has the burden of proving each element of [its] [his] [her] case by clear, cogent, and convincing evidence.

(Name of respondent) has the right to remain silent from the time of [his] [her] detention and is not required to testify. If [he] [she] does not testify, that decision cannot be used to infer a behavioral health disorder or prejudice [him] [her] in any way.

It is your duty as a jury to decide the facts in this case

based upon the evidence presented to you during this trial. Evidence is a legal term. Evidence includes such things as testimony of witnesses, documents, or other physical objects.

During your deliberations, you must apply the law to the facts that you find to be true. It is your duty to accept the law as I give it to you, regardless of what you personally believe the law is or what you think it ought to be. You are to apply the law you receive from me to the facts and in this way decide the case.

(The judge then explains the procedure for jury selection and jury selection is conducted.)

Part 2—After Jury is Selected:

I will now say a few words about the role and function each of us plays during a jury trial. Jury selection is important but what jurors say in jury selection is not evidence. From this point forward, it is essential that all of your decisions be based upon the evidence and the law that come to you in this courtroom and only in this courtroom.

You must not allow yourself to be exposed to any outside information about this case. Do not permit anyone to discuss or comment about it in your presence, and do not remain within hearing of such conversations. This includes electronic conversations as well as oral ones. You must keep your mind free of outside influences so that your decision will be based entirely on the evidence presented during the trial and on my instructions to you about the law.

Until you are dismissed at the end of this trial, you must avoid outside sources such as newspapers, magazines, blogs, the internet, or radio or television broadcasts which may discuss this case or issues involved in this trial. If you start to hear or read information about anything

related to the case, you must act immediately so that you no longer hear or see it. By giving this instruction I do not mean to suggest that this particular case is newsworthy; I give this instruction in every case.

During the trial, do not try to determine on your own what the law is. Do not seek out any evidence on your own. Do not consult dictionaries or other reference materials. Do not conduct any research into the facts, the issues, or the people involved in this case. This means you may not use [Google or other internet search engines] [internet resources] to look into anything at all related to this case. Do not inspect the scene of any event involved in this case. If your ordinary travel will result in passing or seeing the location of any event involved in this case, do not stop or try to investigate. You must keep your mind clear of anything that is not presented to you in this courtroom.

During the trial, do not provide information about the case to other people, including any of the lawyers, parties, witnesses, your friends, members of your family, or members of the media. If necessary, you may tell people (such as your employer or your child's daycare provider) that you are a juror and let them know when you need to be in court. If people ask you for more details, you should tell them that you are not allowed to talk about the case until it is over.

I want to emphasize that the rules prohibiting discussions include your electronic communications. You must not send or receive information about anything related to the case by any means, including by text messages, email, telephone, internet chat, blogs, or social networking web sites. Do not even mention being on a jury when using social media, such as updating your status on Facebook or sending a message on Twitter. You don't want to do anything that will invite others to talk to you about your jury duty.

In short, do not communicate with anyone, by any means, concerning what you see or hear in the courtroom, and do not try to find out more about anything related to this case, by any means, other than what you learn in the courtroom. These rules ensure that the parties will receive a fair trial. If you have any questions about these restrictions, please contact [the bailiff] [(insert other appropriate staff person)].

If you become exposed to any information other than what you learn in the courtroom, that could be grounds for a mistrial. A mistrial would mean that all of the work that you and your fellow jurors put into this trial will be wasted. Re-trials are costly and burdensome to the parties and the public. Also, if you communicate with others in violation of my orders, you could be fined or held in contempt of court.

After you have delivered your verdict, you will be free to do any research you choose and to share your experiences with others.

[Remember that all phones, laptops, and other communication devices must be turned off while you are in court and while you are in deliberations.]

Throughout this trial, you must come and go directly from the jury room. [Follow the [bailiff] [(insert other appropriate staff person)]'s instructions about where to wait in the courthouse and areas that you should avoid.] Do not remain in the hall or courtroom, as witnesses and parties may not recognize you as a juror, and you may accidentally overhear some discussion about this case. Even a communication about an unrelated topic might give a bad impression to others, therefore I have instructed the lawyers, parties, and witnesses not to greet or talk to you during trial.

I want to comment on one other aspect of your role and that is the importance of keeping an open mind

throughout the various stages of these proceedings. The trial has a sensible order to it as each side presents and develops its position.

First: The lawyers will have an opportunity to make opening statements outlining the testimony of witnesses and other evidence that they expect to be presented during trial.

Next: The petitioner will present the testimony of witnesses or other evidence to you. When the petitioner has finished, the respondent may, but need not, present the testimony of witnesses or other evidence. Each witness may be cross-examined by the other side.

Next: When all of the evidence has been presented to you, I will tell you what law applies to this case. The law that applies will be set out in written instructions, which I will read out loud. You will have [individual copies of] the written instructions with you in the jury room during your deliberations.

Next: The lawyers will make closing arguments.

Finally: You will be taken to the jury room by the [bailiff] [(insert other appropriate staff person)] where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a "verdict." During your deliberations, you must apply the law that I provide to you in my instructions to the facts that you find to have been proven.

Until you are in deliberations, you must make sure you are maintaining open minds. If you were to form premature opinions about the case, this would interfere with your ability to get the benefit of each of the subsequent stages.

The attorneys' role is to represent and advocate for

the positions of their respective clients. The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. However, the lawyers' statements are not evidence or the law. The evidence is the testimony and the exhibits. The law is contained in my instructions. You must disregard anything the lawyers say that is at odds with the evidence or the law in my instructions.

You may hear objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

When there is an objection, it is my job to rule on it. One of my duties as judge is to decide whether or not evidence should be admitted during this trial. What this means is that I must decide whether or not you should consider evidence offered by the parties. For example, if a party offers a photograph as an exhibit, I will decide whether it is admissible. Do not be concerned about the reasons for my rulings. You must not consider or discuss any evidence that I do not admit or that I tell you to disregard.

Our state constitution prohibits a trial judge from making a comment on the evidence. For example, it would be improper for me to express my personal opinion about the value of a particular witness's testimony. Although I will not intentionally do so, if it appears to you that I have indicated my personal opinion concerning any evidence, you must disregard that opinion entirely. The reason for this constitutional rule is that it is solely the role of the jurors to weigh and evaluate the evidence in the case.

[You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning. You may ask questions in order to clarify the testimony, but you are not to express any opinion about

the testimony or argue with a witness. If you ask any questions, remember that your role is that of a neutral fact finder, not an advocate.]

[Before I excuse each witness, I will offer you the opportunity to write out a question on a form provided by the court. Do not sign the question. I will review the question to determine if it is legally proper.]

[There are some questions that I will not ask, or will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. If I do not ask a juror's question, or if I rephrase it, do not attempt to speculate as to the reasons and do not discuss this circumstance with the other jurors.]

[By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.]

All proceedings in this trial are recorded [by the court reporter] [through electronic means]. Deliberating juries are rarely, if ever, given access to transcripts or recordings of trial testimony. For this reason, you must pay close attention as the testimony is being presented.

The related point is that you are allowed to take notes during trial. I am not instructing you to take notes, nor am I encouraging you to do so. Taking notes may interfere with your ability to listen and observe. If you choose to take notes, I must remind you to listen carefully to all testimony and to carefully observe all witnesses.

At an appropriate time, the [bailiff] [(insert other appropriate staff person)] will provide a note pad and a pen or pencil to each of you. Your juror number will be on the front page

of the note pad. You must take notes on this pad only, not on any other paper. You must not take your note pad from the courtroom or the jury room for any reason. When you recess during the trial, please (insert appropriate instruction; see Note on Use). At the end of the day, the note pads must be left (insert appropriate instruction; see Note on Use). While you are away from the courtroom or the jury room, no one else will read your notes.

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

You are not to assume that your notes are necessarily more accurate than your memory. I am allowing you to take notes to assist you in remembering clearly, not to substitute for your memory. You are also not to assume that your notes are more accurate than the memories or notes of the other jurors.

After you have reached a verdict, your notes will be collected and destroyed by the [bailiff] [(insert other appropriate staff person)]. No one will be allowed to read them.

Now that you have been empaneled as jurors, you need to take another oath. Please stand and raise your right hand and [I] [the clerk] will administer this oath.

> "Do you solemnly swear or affirm that you will well and truly try this case and render a true verdict based upon the evidence and the law? Please respond."

Having taken your oath as jurors, you are now what the law calls officers of this court. As such, you must not let your emotions overcome your rational thought process. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal

likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.

To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

Thank you for your willingness to serve this court and our system of justice.

NOTE ON USE

This is not one of the written instructions on the law. Part 1 of this instruction is to be read to the panel of prospective jurors before starting jury selection. Part 2 is to be read after jury selection has been completed. A decision must be made as to how much of this advance oral instruction, WPI 360.01, is appropriate in a particular case.

In the paragraphs addressing juror note-taking, insert an appropriate direction to jurors regarding where to leave their notes during court recesses, such as "leave your note pad on your chair" or "take your note pad with you to the jury room." Also insert an appropriate instruction regarding where jurors are to leave their note pads at the end of the day, such as "in the jury room" or "on your chair."

For a discussion of the bracketed paragraphs addressing jurors' questions for witnesses, see the Comment below.

Do not use the bracketed reference to the court reporter when the proceedings are recorded by video or audio recorder. Use the bracketed language on jurors receiving individual copies of the final instructions as applicable.

The instruction's paragraphs about prohibited juror communications and avoiding outside information about the trial are intended for routine cases. For a higher publicity case, the judge should consider expanding on these provisions.

COMMENT

The Legislature amended RCW 71.05 et seq. to collectively refer to

mental illness and substance abuse as behavioral health disorders. See Laws of 2020, Chapter 302, § 41.

This instruction has been revised for this edition. This instruction is modeled primarily after the standard advance oral instruction for civil cases, see WPI 1.01 (Advance Oral Instruction—Beginning of Proceedings), as modified to fit mental illness or substance abuse commitment cases.

See WPI 360.06 (Burden of Proof—Involuntary Treatment) for a discussion of the burden of proof for involuntary treatment proceedings.

Unconscious and conscious bias. This instruction incorporates, in several places, new language concerning both unconscious and conscious bias.

In drafting the language on unconscious and conscious bias, the WPI Committee carefully reviewed the preliminary oral instructions recently adopted for use in criminal cases in the United States District Court, Western District of Washington. There are slight modifications and additions designed, in part, to avoid the state constitutional provision on commenting on the evidence. Const. art. IV, § 16. The original instructions from the district court are set forth at http://www.wawd.uscourts.gov/jury/unconscious-bias (last visited August 12, 2020).

A trial court is not constitutionally-required to *sua sponte* question potential jurors about potential racial bias or to instruct on such issues. State v. Davis, 141 Wn.2d 798, 826–34, 10 P.3d 977 (2000) (death penalty case). The *Davis* court discussed the possibility of "unnecessarily bringing [issues of race] to the attention of jurors" by such inquiry when not requested by defense counsel. *Davis* relied heavily on jurisprudence from the United States Supreme Court, in particular on the death penalty case of Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), and contains a thorough review of federal case law.

The United States Supreme Court in Peña-Rodriguez v. Colorado, __ U.S. __, 137 S.Ct. 855, 869, 197 L.Ed.2d 107 (2017), concluded that the general rule against impeaching a jury verdict must fall when a juror has indicated that he or she relied on racial animus or stereotypes in reaching the verdict. In Turner v. Stime, 153 Wn.App. 581, 222 P.3d 1243 (2009), the court concluded that statements of clear racial bias made by a juror concerning plaintiff's counsel do not "inhere in the verdict" and that it was proper for the trial court to grant a new trial upon proof that such statements were made.

The Washington Supreme Court has emphasized the dangers of

racial bias impacting the fairness of a trial. For example, in State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011), the court unanimously reversed a conviction for prosecutorial misconduct in referring to an "anti-snitch code" allegedly prevalent in the African American community, concluding that when racial bias is shown, it becomes the State's burden to show harmlessness beyond a reasonable doubt. See also City of Seattle v. Erickson, 188 Wn.2d 721, 398 P.3d 1124 (2017) (when the sole member of a racially cognizable group has been subject to a preemptory challenge by the State, a prima facie case of discriminatory purpose has been established).

Voir Dire. The term voir dire has been replaced by jury selection in several places in the instruction for the purpose of better juror comprehension.

Questioning jurors individually. Although this is more common in criminal cases than in civil, the subject matter of the trial may make it necessary to conduct individual questioning on particularly sensitive or private matters. If a juror expresses discomfort in answering such questions in front of the entire panel or if the court determines that all jurors should be questioned individually given the subject matter, individual questioning can occur. Individual questioning may also be warranted when there is a concern that the panel may be unduly influenced by the answers of other potential jurors or if there has been substantial media interest in the case. However, the courtroom must not be closed to the public unless the *Ishikawa* factors are met and the court's findings included in the record. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982); accord State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

Absent *Ishikawa* findings on the record, the courtroom is open during individual questioning of prospective jurors to all members of the public and to the media. It is only the other jurors who are not present for the individual questioning. See State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009). It should be noted that when a juror questionnaire is used as part of jury selection, review of the completed questionnaire in chambers, as a general rule, does not violate the clear mandate of the Washington Constitution article I, section 10 that "justice in all cases shall be administered openly." State v. Slert, 181 Wn.2d 598, 602–608, 334 P.3d 1088 (2014). Although the Supreme Court in *Slert* reversed the Court of Appeals as to its specific conclusion, the Court of Appeals decision does contain a thorough discussion of the law in this area. State v. Slert, 169 Wn.App. 766, 282 P.3d 101 (2012).

Confidentiality. Under RCW 71.05.620, files and records of court proceedings under RCW Chapter 71.05 are closed to the public because

of the sensitivity of the information contained in them. Former MPR 1.3 presumptively closed the courtroom to the public, as well. However, that rule was held to be unconstitutional, and the trials are now presumptively open to the public, although the court files remain under seal. In re Detention of D.F.F., 172 Wn.2d 37, 41–42, 256 P.3d 357 (2011). A party may seek to have the courtroom closed but any person or party in the courtroom, including the public or press, may object to such a closure. The court must conduct a "*Bone-Club* analysis" on the record before the court may close the courtroom. See Bone-Club, 128 Wn.2d 254. No cases have addressed whether, after a trial is over, the jurors may disclose the identity of the respondent or discuss the content of the respondent's medical records if those records are admitted at trial in open court. Nor have the courts determined whether jurors should be instructed on the confidentiality of the content of a respondent's medical records.

Jurors Proposing Questions for Witnesses. CR 43(k) allows jurors to submit written questions to witnesses in civil cases. The civil rules apply to trials under the Involuntary Treatment Act. See CR 81(a) (applicability of civil rules to "special proceedings"); MPR 3.4(a); In re Detention of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984). In the case of In re Detention of Greenwood, 130 Wn.App. 277, 122 P.3d 747 (2005), the court held that the jury was properly permitted to submit written questions in a sexually violent predator civil commitment trial. While cases have approved the use of questions in other types of civil proceedings, no cases have addressed the practice in proceedings under RCW Chapter 71.05.

The Washington State Jury Commission recommended that the judge use the following procedures for handling juror questions submitted for witnesses:

1. At the conclusion of each witness's testimony, the court asks if jurors have written questions, which are brought to the judge;

2. Outside the presence of the jury, counsel are given the opportunity to make objections to the question or to suggest modifications to the question, by passing the written question between counsel and the court during a side-bar conference or by excusing jurors to the jury room;

3. The judge asks the question of the witness;

4. Counsel are permitted to ask appropriate follow-up questions; and

5. The written questions are made part of the record.

Washington State Jury Commission Report, Recommendation 33 (July 2000) (narrative section). Additionally, the judge may rephrase, reword, or refuse to allow particular juror questions, see CR 43(k) and CRLJ 43(k), and objections to the written questions should be made a part of the record.

Juror note-taking. Jurors must be permitted to take notes during civil trials. However, the judge has discretion in deciding whether to allow jurors to review their own notes in the jury room during recesses. CR 47(j); CRLJ 38(h).

Copies of instructions. The instruction includes a bracketed phrase informing jurors that at the end of the trial they will each receive a copy of the final instructions. The Washington State Jury Commission has recommended that this practice be adopted, to the extent feasible. Washington State Jury Commission's Report to the Board for Judicial Administration, Recommendation 35 (July 2000) (for text see Appendix G of this volume). This practice helps jurors to more readily understand the final instructions and improves their deliberation process. See the Jury Commission's Report, Recommendation 35 (accompanying narrative section).

Repeating testimony. See the Comment to WPI 6.19 (Jurors Rehearing Trial Testimony—Cautionary Instruction).

Improper juror communications. The instruction warns jurors, after they have been selected to serve on a case, against participating in improper communications and research about the case. Some of this information, however, should be given to potential jurors before they arrive in the courtroom for jury selection. Courts should make sure that potential jurors who are reporting for jury duty know that they should not seek out or receive any information about pending legal cases or issues.

Because it is juror misconduct to "extra-judicially acquire case-specific information during the course of the trial," State v. Tigano, 63 Wn.App. 336, 341, 818 P.2d 1369, 1372 (1991), it is important to so notify the jurors at the outset.

[Current as of January 2021.]

WPI 360.02

CONCLUSION OF TRIAL—INTRODUCTORY INSTRUCTION—BEHAVIORAL HEALTH DISORDER—INVOLUNTARY TREATMENT

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law that I give you to the facts that you decide have been proved, and in this way decide the case. By applying the law to the facts, you will be able to decide this case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses [, and the exhibits that I have admitted,] during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

[Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.]

In order to decide whether the petitioner's allegations have been proved, you must consider all of the evidence that I have admitted. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness and of the value or weight to be given to the testimony of each witness. In assessing credibility, you must avoid bias, conscious or unconscious, including bias based on religion, ethnicity, race, sexual orientation, gender or disability.

In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things [he] [she] testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer. These objections should

not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

NOTE ON USE

Give this general instruction in every behavioral health disorder involuntary commitment case. Do not use this instruction in cases for the civil commitment of sexual predators.

Use WPI 1.03 (Direct and Circumstantial Evidence) if requested.

COMMENT

This instruction is adapted from WPI 1.02 (Introductory Instruction) to fit an Involuntary Treatment Act case.

The WPI Committee has added an admonition that the jurors must not let bias, conscious or unconscious, influence their assessment of credibility. For further discussion of conscious or unconscious bias, see the Comment to WPI 1.01 (Advance Oral Instruction—Beginning of Proceeding).

This instruction does not address whether the jury may consider the respondent's courtroom demeanor in making its determination.

In State v. Barry, 179 Wn.App. 175, 317 P.3d 528 (2014), affirmed, 183 Wn.2d 297, 352 P.3d 161 (2015), the court held that the evidence properly considered consists of the testimony of the witnesses and admitted exhibits; the courtroom demeanor of a defendant is itself not evidence and may not be considered by the jury. However, in Involuntary Treatment Act cases, an expert witness, present in the courtroom during the trial, frequently observes a respondent's courtroom demeanor or behavior and testifies regarding his or her observations as a part of the expert's opinion regarding the respondent's mental state. See, e.g., In re Detention of LaBelle, 107 Wn.2d 196, 215, 728 P.2d 138, 150 (1986) ("The State's other witness, Dr. Hyde, based his testimony on a personal interview with [the respondent], review of the medical charts and records, and observations during the hearing."). An expert's testimony about in-court observations of the respondent, subject to cross-examination, is evidence which a jury may consider.

[Current as of January 2021.]

WPI 360.04

BEHAVIORAL HEALTH DISORDER—INVOLUNTARY TREATMENT—90 DAYS

Before the respondent (fill in name) can be involuntarily treated for a period not to exceed 90 days, the petitioner must prove by clear, cogent, and convincing evidence that the respondent has a behavioral health disorder and that [he] [she]:

[has threatened, attempted, or inflicted [physical harm upon [the person of another] [or] [himself] [herself]] [or] [substantial damage upon the property of another] after having been taken into custody for evaluation and treatment; and as a result of a behavioral health disorder presents a likelihood of serious harm] [or]

[was taken into custody as a result of conduct in which [he] [she] attempted or inflicted physical harm upon [the person of another] [or] [himself] [herself] or substantial damage upon the property of others; and as a result of a behavioral health disorder continues to present a likelihood of serious harm] [or]

[is gravely disabled as a result of a behavioral health disorder] [or]

[is in need of assisted outpatient behavioral health treatment].

If you find that the respondent should be involuntarily treated, you must then decide whether the best interest of the respondent or others will be served by a less restrictive treatment that is an alternative to detention. Before the respondent can be detained for a period not to exceed 90 days, it must be proved by clear, cogent, and convincing evidence that no less restrictive treatment is in the best interest of the respondent or others.

NOTE ON USE

Use this instruction for 90-day involuntary treatment cases.

Under one set of circumstances, the instruction may also apply to a petition filed for 180-days ofinvoluntary treatment. See the discussion in the Comment to WPI 360.05 (Behavioral Health Disorder—Involuntary Treatment—180 Days).

Select bracketed paragraphs as applicable.

Use WPI 360.06 (Burden of Proof—Behavioral Health Disorder—Involuntary Treatment) and WPI 360.10.01 (Behavioral Health Disorder—Definition) with this instruction. As applicable, use WPI 360.05.03 (In Need of Assisted Outpatient Treatment—Definition), WPI 360.11 (Custody—Behavioral Health Disorder—Definition), WPI 360.12 (Gravely Disabled—Behavioral Health Disorder—Definition), and WPI 360.13 (Likelihood of Serious Harm—Behavioral Health Disorder—Definition) with this instruction.

COMMENT

Laws of 2020, Chapter 302, § 41; RCW 71.05.280; RCW 71.05.320 (1).

Constitutional requirements. This instruction's first paragraph conforms with the U.S. Supreme Court's opinion in Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). In that case, the court invalidated a Louisiana statute that permitted indefinite detention of insanity acquittees who are not mentally ill but who do not prove that they would not be dangerous. The court held that under the Due Process Clause, a state may confine a person for mental illness only if it shows that the person is both mentally ill and dangerous. See also the discussion below for constitutional issues related to commitments based on a felony.

Burden of proof. In In re Detention of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984), the court held that the respondent is entitled to an instruction stating that the burden of proof is upon the petitioner to prove each element of its case by the requisite standard. The WPI Committee concluded that WPI 360.04, as revised, meets this requirement. The requirement is also reflectedin a revised version of WPI 360.06 (Burden of Proof—Behavioral Health Disorder—Involuntary Treatment).

Less restrictive alternative. RCW 71.05.320(2) mandates

instructing on less restrictive treatment, as an alternative to detention in the 90-day treatment situation. The jury must be instructed to consider a less restrictive treatment that is an alternative to detention whether or not evidence shows a less restrictive alternative is available. In re Detention of R.A.W., 104 Wn.App. 215, 15 P.3d 705 (2001).

[Current as of January 2021.]

WPI 360.05

BEHAVIORAL HEALTH DISORDER—INVOLUNTARY TREATMENT—180 DAYS

Before the respondent (fill in name) can be involuntarily treated for a period not to exceed 180 days, the petitioner must prove by clear, cogent, and convincing evidence that the respondent has a behavioral health disorder and that [he] [she]:

[has threatened, attempted, or inflicted [physical harm upon the person of another] [or] [substantial damage upon the property of another] during the current period of court ordered treatment; and as a result of a behavioral health disorder presents a likelihood of serious harm] [or]

[was taken into custody as a result of conduct in which [he] [she] attempted or inflicted serious physical harm upon the person of another, and continues to present, as a result of a behavioral health disorder, a likelihood of serious harm] [or]

[has been determined to be incompetent and felony criminal charges have been dismissed pursuant to that determination and has committed acts constituting the felony of (specify felony or felonies) and as a result of [his] [her] behavioral health disorder, presents a substantial likelihood of repeating similar acts; [it is not necessary to show intent, willfulness, or state of mind as an element of the felony]]

[is in custody pursuant to previous findings that felony charges have been dismissed due to a determination of incompetency, [he] [she] has committed acts constituting the felony of (specify felony or felonies) and as a result of [his] [her] behavioral health disorder has a substantial likelihood of committing substantial felony acts and as a result of [his] [her] behavioral health

disorder or developmental disability continues to present a substantial likelihood of repeating acts similar to (specify felony or felonies found inprevious ITA court proceedings)**, when considering the person's life history, progress in treatment, and the public safety] [or]**

[continues to be gravely disabled] [or]

[is in need of assisted outpatient behavioral health treatment].

If you find that the respondent should be involuntarily treated, you must then decide whether the best interest of the respondent or others will be served by a less restrictive treatment that is an alternative to detention. Before the respondent can be detained for a period not to exceed 180 days, it must be proved by clear, cogent, and convincing evidence that no less restrictive treatment is in the best interest of the respondent or others.

NOTE ON USE

Use this instruction for 180-day involuntary treatment cases.

Select bracketed paragraphs as applicable. If the conduct required by the second bracketed paragraph (see RCW 71.05.320(4)) or the third bracketed paragraph (see RCW 71.05.320(4)(c)) was previously proven in a prior 90 or 180 day commitment hearing, then it is not necessary to prove such conduct again. If the fourth bracketed paragraph is selected, set forth the elements of the felony committed, excluding the element of intent, willfulness, or state of mind. Use the criminal pattern jury instructions, as necessary, for definitions of crimes. The fourth and fifth bracketed paragraphs may not be simultaneously used. The fourth bracketed paragraph is only for individuals who have had charges dismissed pursuant to RCW 10.77.086(4) and for whom the initial petition for civil commitment pursuant to RCW 71.05.280(3) has been filed. The fifth bracketed paragraph is only for individuals who have previously been committed pursuant to RCW 71.05.280(3) and additional involuntary treatment is now sought under RCW 71.05.320(4).

Use WPI 360.03 (Behavioral Health Disorder—Involuntary Treatment—Explanation), WPI 360.06 (Burden of Proof—Behavioral Health Disorder—Involuntary Treatment), and WPI 360.10.01 (Behavioral

Health Disorder—Definition) with this instruction. Use WPI 360.05.03 (In Need of Assisted Mental Health Treatment—Definition), WPI 360.11 (Custody—Behavioral Health Disorder—Definition), and WPI 360.12 (Gravely Disabled—Definition) as applicable with this instruction.

COMMENT

Laws of 2020, Chapter 302, § 41; RCW 71.05.320(2); RCW 71.05.280(3).

Constitutionality. The first paragraph of this instruction conforms with the U.S. Supreme Court's opinion in Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). In that case, the court invalidated a Louisiana statute that permitted indefinite detention of insanity acquittees who are not mentally ill but who do not prove that they would not be dangerous. The court held that under the Due Process Clause a state may confine a person for mental illness only if it shows that the person is both mentally ill and dangerous.

The statutes allowing involuntary commitment for persons found incompetent to stand trial on felony charges have been found constitutional. See In re Detention of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984) (the burden of proof, at a 90-day involuntary commitment proceeding, is proof by clear, cogent and convincing evidence); In re Detention of Patterson, 90 Wn.2d 144, 579 P.2d 1335 (1978) (overruled on other grounds). Practitioners should be aware, however, that *Patterson* might not have laid to rest all constitutional issues for proving dangerousness. These issues continue to be litigated in more recent civil commitment cases, including cases involving commitment of sexually violent predators under RCW Chapter 71.09.

RCW 71.05.280(3) permits commitment of a person adjudicated incompetent in criminal proceedings upon proof of "acts constituting a felony" but without needing to prove the mental state associated with the crime. One possible area of uncertainty, however, arises when the underlying felony consists only of an offense based upon threatening speech (i.e. felony harassment). In criminal prosecutions, the First Amendment of the United States Constitution requires proof of a "true threat," which is defined as "a statement made in a context or under such circumstances wherein a reasonable person would foresee the statement would be interpreted as a serious expression of intention to inflict bodily harm or to take the life of another person." State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215, 1219 (2004); see also Comment to WPIC 2.24 (Threat—Definition). Washington's appellate courts have not yet decided whether the "true threat" requirement applies to civil commitment proceedings under RCW 71.05.280(3) when the underlying felony is based upon threatening speech.

In In re Detention of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984), the court held that the respondent is entitled to an instruction stating that the burden of proof is on the petitioner to prove each element of its case by the requisite standard. The WPI Committee concluded that WPI 360.05, as revised, meets this requirement. The requirement is also reflected in a revised version of WPI 360.06 (Burden of Proof—Behavioral Health Disorder—Involuntary Treatment).

Facts proved in a previous proceeding. The instruction is drafted under the assumption that certain facts contained in the statutory elements were proved at the earlier commitment proceeding. See RCW 71.05.320(4). More specifically, if the commitment is being sought under the second paragraph, which involves previous infliction of harm pursuant to RCW 71.05.320(3)(b), or is being sought under the fifth paragraph, which involves a finding of incompetency on previous felony charges under RCW 71.05.280(3), the element of proving the respondent committed the prior acts will usually have been proved in the first commitment proceeding and need not be proved again. See RCW 71.05.320(3) ("If the conduct required to be proven in (b) and (c) of this subsection was found by a judge or jury in a prior trial under this chapter, it shall not be necessary to prove such conduct again.").

In re Detention of W.R.G., 110 Wn.App. 318, 40 P.3d 1177 (2002), suggests in dicta that the "taken into custody" language should similarly be deleted from the instruction if this fact was proved in an earlier proceeding.

Petition based on a felony, but commitment on other grounds. RCW 71.05.280(3) and RCW 71.05.320(1) allow for individuals referred to the state hospital following dismissal of felony criminal charges due to incompetency to be committed for up to 180 days, rather than the 90 days typically allowed under RCW 71.05.280. However, if a petition for 180 days of involuntary treatment is filed based on the felony grounds, but the felony grounds are not proven at trial and other grounds of commitment are proven, the order for treatment can only be for 90 days. See In re Detention of R.H., 178 Wn.App. 941, 316 P.3d 535 (2014).

Acts constituting a felony. RCW 71.05.320(2)(c) refers to RCW 71.05.280 and makes the fourth bracketed paragraph of this instruction applicable only if the acts committed constitute a felony, and excludes the elements of intent, willfulness, or state of mind.

Felony acts constituting a violent offense. RCW 71.05.280(3) provides that for any person subject to commitment under the fourth bracketed paragraph where the charge underlying the finding of incom-

petence is for a felony classified as violent under RCW 9.94A.030, the court shall determine whether the acts the person committed constitute a violent offense under RCW 9.94A.030.

Less restrictive alternative. RCW 71.05.320(1) mandates instructing on less restrictive treatment as an alternative to detention in the 90-day treatment situation. Although RCW 71.05.320 is not clear whether this requirement applies as well to 180-day commitment proceedings, case law suggests that it does. See In re Detention of R.A.W., 104 Wn.App. 215, 15 P.3d 705 (2001) (implicitly applying the less restrictive alternative requirements from RCW 71.05.320(1) to a 180-day petition brought pursuant to RCW 71.05.320(2)). The same result is also likely under equal protection analysis. See In re Detention of Dydasco, 135 Wn.2d 943, 959 P.2d 1111 (1998) (equal protection requires that a notice provision applying expressly only to 14-day commitments must also be applied to 90-day and 180-day commitments).

The jury must be instructed to consider a less restrictive treatment that is an alternative to detention whether or not evidence shows a less restrictive alternative is available. R.A.W., 104 Wn.App. at 221–23.

[Current as of January 2021.]

WPI 360.05.01

LIKELIHOOD OF REPEATING SIMILAR ACTS—FACTORS

In determining whether a person presents a substantial likelihood of repeating similar acts, you may consider the charged criminal behavior, the person's life history, the person's progress in treatment, and public safety, together with any other factors bearing on the question.

NOTE ON USE

This instruction should be given only when commitment is sought under the prong of RCW 71.05.320 involving respondent's incompetence to stand trial on acts constituting a felony. In such a case, the instruction should be used with WPI 360.05 (Behavioral Health Disorder—Involuntary Treatment—180 Days).

COMMENT

RCW 71.05.320.

For cases brought under RCW 71.05.320, involving a respondent's incompetence to stand trial on acts constituting a felony, the petitioner must show that the respondent "presents a substantial likelihood of repeating similar acts considering the charged criminal behavior, life history, progress in treatment, and the public safety." RCW 71.05.320 (4). Because the Legislature did not state that this list of factors is exclusive, and because other factors might also bear on the respondent's likelihood of repeating similar acts, the WPI Committee has phrased the instruction so as to allow consideration of other relevant factors.

[Current as of January 2021.]

WPI 360.05.02

LESS RESTRICTIVE ALTERNATIVE—BEHAVIORAL HEALTH DISORDER—INVOLUNTARY TREATMENT—DEFINITION

Less restrictive alternative treatment means an individualized program of court-ordered behavioral health treatment, under conditions to be imposed by the judge, in a setting other than detention. Less restrictive alternative treatment may include behavioral health treatment on an outpatient basis, medication, substance abuse counseling, residential treatment, housing, and other conditions to be imposed by the judge.

NOTE ON USE

This instruction may be used to assist jurors in understanding the general nature of less restrictive alternative treatment. A jury is required to consider the appropriateness of a less restrictive alternative if the jury finds a person has a behavioral health disorder. See WPI 360.21 (Special Verdict Form [A] (90 Days)—Behavioral Health Disorder—Involuntary Treatment), WPI 360.22 (Special Verdict Form [A] (180 Days)—Behavioral Health Disorder—Involuntary Treatment), and WPI 360.23 (Special Verdict Form [B]—Behavioral Health Disorder—Involuntary Treatment—In Need of Assisted Outpatient Treatment).

COMMENT

Laws of 2020, Chapter 302, § 41; RCW 71.05.020(31); RCW 71.05.320(2); RCW 71.05.585.

Under RCW 71.05.320(2), the judge has three options when the jury's verdict is for less restrictive treatment. The judge must remand the respondent into the custody of the Department of Social and Health Services (DSHS), or into a facility that DSHS has certified for 90-day treatment, or to a less restrictive alternative. However, if the sole basis for commitment is "in need of assisted outpatient treatment," the court must enter an order for less restrictive alternative treatment and may not order inpatient treatment. See RCW 71.05.320(2).

[Current as of February 2021.]

WPI 360.05.03

IN NEED OF ASSISTED OUTPATIENT TREATMENT—DEFINITION

In need of assisted outpatient behavioral health treatment means that a person, as a result of a behavioral disorder:

(1) [has been committed by a court to detention for involuntary mental health treatment at least twice during the preceding thirty-six months] [or]

[is currently committed for involuntary behavioral health treatment and has been committed to detention for involuntary behavioral health treatment at least once during the thirty-six months preceding the date of initial detention of the current commitment cycle];

(2) is unlikely to voluntarily participate in outpatient treatment without an order for less restrictive alternative treatment, in view of the person's [treatment history] [or] [current behavior];

(3) is unlikely to survive safely in the community without supervision;

(4) is likely to benefit from less restrictive alternative treatment; and

(5) requires less restrictive alternative treatment to prevent [a] [relapse] [,] [decompensation] [,] [or] [deterioration] that is likely to result in the person [presenting a likelihood of serious harm] [or] [becoming gravely disabled within a reasonably short period of time].

NOTE ON USE

Use with WPI 360.04 (Behavioral Health Disorder—Involuntary

Treatment—90 Days), WPI 360.05 (Behavioral Health Disorder—Involuntary Treatment—180 Days), WPIC 360.21 (Special Verdict Form [A] (90 Days)—Behavioral Health Disorder—Involuntary Treatment), and WPIC 360.22 (Special Verdict Form [A] (180 Days)—Behavioral Health Disorder—Involuntary Treatment).

Use paragraphs (1), (2), and (3) to the extent the elements are supported by the evidence and reletter/renumber as needed.

COMMENT

Laws of 2020, Chapter 302, § 41; RCW 71.05.020(27); RCW 71.05.280; RCW 71.05.320.

For purposes of (1) of this instruction, time spent in a mental health facility or in confinement as a result of a criminal conviction is excluded from the thirty-six month calculation. If there is an issue regarding calculation of the thirty-six month period, then the instruction will need to be modified.

[Current as of January 2021.]

WPI 360.06

BURDEN OF PROOF—BEHAVIORAL HEALTH DISORDER—INVOLUNTARY TREATMENT

(The state, or name of petitioner) is the petitioner and has the burden of proving each element of this case by clear, cogent, and convincing evidence. Clear, cogent, and convincing evidence exists when the element has been shown by the evidence to be highly probable.

Proof by clear, cogent, and convincing evidence requires a greater showing than is required under the "preponderance of the evidence" standard that is used in many other civil cases. Preponderance of the evidence exists when an element has been shown to be more probably true than not true.

On the other hand, proof by clear, cogent, and convincing evidence does not require as great a showing as is required under the "reasonable doubt" standard used in criminal cases. Reasonable doubt means such a doubt as exists in the mind of a reasonable person after fully, fairly, and carefully considering all the evidence or lack of evidence.

"Preponderance of the evidence" and "beyond a reasonable doubt" are defined here solely to aid you in understanding the meaning of "clear, cogent, and convincing" evidence.

The respondent does not have the burden to prove or disprove any element of the case.

NOTE ON USE

Use this instruction in every Involuntary Treatment Act case.

COMMENT

The Legislature amended RCW 71.05 et seq. to collectively refer to

mental illness and substance abuse as behavioral health disorders. See Laws of 2020, Chapter 302, § 41.

The burden of proof mandated by the statute is clear, cogent, and convincing evidence. RCW 71.05.310. The jury must be instructed that clear, cogent, and convincing evidence is greater evidence than a preponderance. Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

The instruction incorporates a simplified version of the definition of "clear, cogent, and convincing evidence" suggested by the court in In re Detention of LaBelle, 107 Wn.2d 196, 728 P.2d 138 (1986). In *LaBelle*, the court stated that the phrase "clear, cogent, and convincing evidence" in involuntary commitment proceedings means "the ultimate fact in issue must be shown by evidence to be 'highly probable.' " LaBelle, 107 Wn.2d at 209; see also Morris v. Blaker, 118 Wn.2d 133, 821 P.2d 482 (1992). The WPI Committee has simplified this definition by omitting the phrase "the ultimate fact in issue," both because the phrase is not typically included in burden-of-proof definitions and because it would be difficult for jurors to understand. The WPI Committee has adjusted the definition of "preponderance of the evidence" so that it parallels the definition of "clear, cogent, and convincing evidence."

The instruction's format is similar to that of WPI 160.02 (Fraud—Burden of Proof), the civil instruction that defines the phrase clear, cogent, and convincing evidence for purposes of proving fraud. The definition of reasonable doubt comes from WPIC 4.01 (Burden of Proof—Presumption of Innocence—Reasonable Doubt) and the definition of preponderance of the evidence comes from WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence), the pattern instruction for civil cases.

In In re Detention of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984), the court upheld a prior version of WPI 360.06. The court rejected the respondent's argument that the instruction should state that the burden of proof was much closer to the standard of beyond a reasonable doubt than it was to the standard of a preponderance of the evidence. In the same case, however, the court held that the respondent is entitled to an instruction stating that the burden of proof is upon the petitioner to prove each element of its case by the requisite standard.

[Current as of January 2021.]

WPI 360.10

MENTAL DISORDER—DEFINITION

Mental disorder means any organic, mental, or emotional impairment that has substantial adverse effects on the individual's cognitive or volitional functions.

[Cognitive function refers to the mental processes by which a person becomes aware of, perceives, and comprehends ideas. It involves all aspects of perception, thinking, reasoning, and remembering.]

[Volitional function refers to the use of a person's own will in performing or abstaining from action.]

NOTE ON USE

Use the first paragraph in every case. The bracketed paragraphs may be used to assist jurors in understanding the terms used in the first paragraph. Use with WPI 360.10.01 (Behavioral Health Disorder—Definition).

COMMENT

The instruction's first paragraph uses wording from RCW 71.05.020 (37).

The bracketed paragraphs use language derived from Mosby's Medical, Nursing & Allied Health Dictionary, pp. 361 and 1719 (5th ed.). These bracketed paragraphs may be used to assist jurors in understanding the concepts involved in the underlying definition of "mental disorder."

A developmentally disabled person may be found to have a "mental disorder" supporting involuntary commitment if the developmental disability substantially affects that person's cognitive or volitional functions. In re Detention of R.S., 124 Wn.2d 766, 881 P.2d 972 (1994).

[Current as of January 2021.]

WPI 360.10.01

BEHAVIORAL HEALTH DISORDER—DEFINITION

Behavioral health disorder means [either] [a] [mental disorder] [or] [substance use disorder] [,] [or] [a co-occurring mental disorder and substance use disorder].

NOTE ON USE

Use bracketed material as applicable. Use as needed with WPI 360.10 (Mental Disorder—Disorder) and WPI 360.10.02 (Substance Use Disorder—Definition).

COMMENT

The Legislature amended RCW 71.05 et seq. to collectively refer to mental illness and substance abuse as behavioral health disorders. See Laws of 2020, Chapter 302, § 41.

[Current as of January 2021.]

WPI 360.10.02

SUBSTANCE USE DISORDER—DEFINITION

Substance use disorder means a cluster of cognitive, behavioral, and physiological symptoms indicating that an individual continues using the substance despite significant substance-related problems. The diagnosis of a substance use disorder is based on a pathological pattern of behaviors related to the use of the substances.

NOTE ON USE

Use with WPI 360.10.01 (Behavioral Health Disorder—Definition).

COMMENT

RCW 71.05.020(52).

[Current as of January 2021.]

WPI 360.11

CUSTODY—BEHAVIORAL HEALTH DISORDER—DEFINITION

Custody means involuntary detention under the state's mental health laws [uninterrupted by any period of unconditional release from commitment from a facility providing involuntary care and treatment].

NOTE ON USE

Use bracketed material as applicable. In some cases, the jurors will need additional instruction using more specific language from RCW Chapter 71.05 or Chapter 10.77, as applicable, addressing when a respondent is in custody.

COMMENT

The Legislature amended RCW 71.05 et seq. to collectively refer to mental illness and substance abuse as behavioral health disorders. See Laws of 2020, Chapter 302, § 41.

This instruction is taken from the statutory definition.

[Current as of January 2021.]

WPI 360.12

GRAVELY DISABLED—BEHAVIORAL HEALTH DISORDER—DEFINITION

Gravely disabled means a condition in which a person, as a result of a behavioral health disorder:

(1) is in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety, or

(2) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving or would not receive, if released, such care as is essential for his or her health or safety.

NOTE ON USE

Use this definition in every case involving grave disability.

COMMENT

RCW 71.05.020(23). The Legislature amended RCW 71.05 et seq. to collectively refer to mental illness and substance abuse as behavioral health disorders. See Laws of 2020, Chapter 302, § 41.

The Washington Supreme Court upheld prior (but substantially similar) versions of RCW 71.05.020 against challenges that the statutes were unconstitutionally vague or overbroad. In re Detention of LaBelle, 107 Wn.2d 196, 728 P.2d 138 (1986). The court in *LaBelle* construed RCW 71.05.020 to require a showing of a substantial risk of danger of serious harm resulting from the failure to provide for essential health and safety needs. In making this showing, the State "must present recent, tangible evidence of failure or inability to provide for such essential human needs as food, clothing, shelter, and medical treatment that presents a high probability of serious physical harm within the near future unless adequate treatment is afforded." LaBelle, 107 Wn.2d at 204–05; see Morris v. Blaker, 118 Wn.2d 133, 138, 821 P.2d 482 (1992) (quoting *LaBelle*). Furthermore, the failure or inability to provide for these essential needs must be shown to arise as a result of mental disorder and not because of other factors. LaBelle, 107 Wn.2d at 204–05.

When the State is proceeding under the gravely disabled standard defined in RCW 71.05.020, the evidence must provide a factual basis for concluding that an individual manifests severe mental deterioration in routine functioning. This evidence must include recent proof of significant loss of cognitive or volitional control. In addition, the evidence must reveal a factual basis for concluding that the individual is not receiving or would not receive, if released, such care as is essential for his or her health or safety. It is not enough to show that care and treatment of an individual's mental illness would be preferred or beneficial or even in his or her best interests. To justify commitment, such care must be shown to be essential to an individual's health or safety and the evidence should indicate the harmful consequences likely to follow if involuntary treatment is not ordered. Moreover, the person with the mental disorder must be unable, because of severe deterioration of mental functioning, to make a rational decision with respect to his or her need for treatment. LaBelle, 107 Wn.2d 196.

Depending on the facts of the particular case, it may be advisable to supplement the instruction with language from *LaBelle* or *R.A.W.* in order to more fully explain the meaning of the statutory language. See LaBelle, 107 Wn.2d at 204–08 (construing the statutory definition of "gravely disabled" so that the statute is neither vague nor overbroad); In re Detention of R.A.W., 104 Wn.App. 215, 224–25, 15 P.3d 705 (2001) (approving the trial court's instruction, which was taken directly from this pattern instruction, but also setting forth an analysis that provides greater specificity as to the statutory requirements).

[Current as of January 2021.]

WPI 360.13

LIKELIHOOD OF SERIOUS HARM—BEHAVIORAL HEALTH DISORDER—DEFINITION

Likelihood of serious harm means [either]:

[a substantial risk that physical harm will be inflicted by an individual upon his or her own person, as evidenced by recent threats or attempts to commit suicide or inflict physical harm on oneself] [or]

[a substantial risk that physical harm will be inflicted by an individual upon another, as evidenced by a recent overt act that caused such harm or which places another person or persons in reasonable fear of sustaining such harm] [or]

[a substantial risk that physical harm will be inflicted by an individual upon property of others, as evidenced by a recent overt act that caused substantial loss or damage to the property of others] [or]

[the individual has threatened the physical safety of another and has a history of one or more violent acts].

NOTE ON USE

Use bracketed material as applicable.

Do not use the first bracketed paragraph relating to serious harm to oneself in 180-day treatment instructions.

COMMENT

RCW 71.05.020(35). The Legislature amended RCW 71.05 et seq. to collectively refer to mental illness and substance abuse as behavioral health disorders. See Laws of 2020, Chapter 302, § 41.

Under RCW 71.05.320(2)(a) through (d), relating to 180-day treatment cases, harm to oneself is not included as an element.

The WPI Committee has substituted the words "a recent overt act"

for the word "behavior" in the second and third paragraphs of this instruction based on In re Detention of Harris, 98 Wn.2d 276, 654 P.2d 109 (1982). In *Harris*, the court interpreted then RCW 71.05.020(3) "as requiring a showing of a substantial risk of physical harm as evidenced by a recent overt act." Harris, 98 Wn.2d at 284.

Despite this holding from *Harris*, two Court of Appeals cases have held that how "recent" the act must be may depend upon the patient's opportunity to reoffend. In re Detention of P.S., 75 Wn.App. 571, 879 P.2d 294 (1994); In re Detention of Pugh, 68 Wn.App. 687, 845 P.2d 1034 (1993). In *Pugh*, a Division II case, the court found that the absence of overt acts more recent than five years before the hearing was

> readily explainable as a lack of opportunity to offend rather than a demonstration of improvement so as to negate the showing that he presents a substantial risk of physical harm. We are satisfied that his earlier offenses resulting in convictions when considered with his confinement and current diagnosis satisfy the requirement that his future dangerousness be evidenced by a recent overt act.

Pugh, 68 Wn.App. at 696. Division I followed the *Pugh* rationale in *P.S.*, finding a 1989 rape charge sufficient evidence of a recent overt act to support a 1992 finding in favor of continued commitment, when combined with evidence of other behavior and expert testimony supporting a great likelihood of reoffense. P.S., 75 Wn.App. at 574–77.

[Current as of January 2021.]

WPI 360.13.01

OVERT ACT—RECENT—HISTORY OF VIOLENT ACTS—VIOLENT ACT—DEFINITIONS

[An "overt act" is an act that causes harm or creates a reasonable apprehension of dangerousness.]

[In determining whether an "overt act" is "recent," you may consider the extent to which the individual has had an opportunity to commit such acts or engage in similar behavior. You may also consider the time span in the context of all the surrounding relevant circumstances.]

["History of one or more violent acts" refers to the period of time ten years prior to the filing of a petition under this chapter, excluding any time spent, but not any violent acts committed, in a behavioral health facility or in confinement as a result of a criminal conviction.]

["Violent act" means behavior that resulted in homicide, attempted suicide, nonfatal injuries, or substantial damage to property.]

NOTE ON USE

Use this instruction to define the terms contained in WPI 360.13 (Likelihood of Serious Harm—Behavioral Health Disorder—Definition). Choose from among the above definitions depending on the terms that are used in WPI 360.13 (Likelihood of Serious Harm—Behavioral Health Disorder—Definition).

COMMENT

The definition of "overt act" is taken from In re Detention of Harris, 98 Wn.2d 276, 284–85, 654 P.2d 109 (1982).

The definition of "recent" for purposes of an overt act is taken from In re Detention of Pugh, 68 Wn.App. 687, 695–96, 845 P.2d 1034 (1993). In order to cover all the applicable circumstances, the WPI Committee has replaced *Pugh's* term "opportunity to re-offend" with "opportunity to commit such acts or engage in similar behavior."

The definitions of "history of one or more violent acts" and "violent

act" are taken from RCW 71.05.020(19) and (48). A separate but related statute, RCW 71.05.245, states that the court, when determining the issue of likelihood of serious harm, must give great weight to any recent history of one or more violent acts, which the statute then defines as a period of three years. Courts should use caution in instructing jurors as to giving great weight under RCW 71.05.245, because similar language in RCW 71.05.012's statement of legislative intent has been held to constitute an impermissible comment on the evidence. See In re Detention of R.W., 98 Wn.App. 140, 144–46, 988 P.2d 1034 (1999) (noting, however, that instructing jurors as to an accurate statement of law, as opposed to a legislative statement of intent, does not constitute a comment on the evidence).

[Current as of January 2021.]

WPI 360.14

BEHAVIORAL HEALTH DISORDER— RESPONDENT'S FAILURE TO TESTIFY

In an involuntary treatment proceeding, the respondent has a right to remain silent from the time of [his] [her] detention. A respondent may not be compelled to testify. The fact that (name of respondent) has exercised [his] [her] right to remain silent cannot be used to infer a mental disorder and should not prejudice [him] [her] in any way.

NOTE ON USE

Use this instruction if requested. See Comment.

COMMENT

Upon request, the respondent has a right to an instruction such as WPI 360.14. In re Detention of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984) (addressing the former version of this instruction, WPIC 200.14).

A person detained for involuntary mental illness treatment has the right to remain silent from the time of the initial detention and is not required to testify in court proceedings. See RCW 71.05.217; RCW 71.05.300; RCW 71.05.310.

[Current as of January 2021.]

WPI 360.15

BEHAVIORAL HEALTH DISORDER—EXPERT TESTIMONY—LIMITATION ON CONSIDERATION OF EVIDENCE

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts. You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

[An expert witness may have testified to information outside of the witness's personal knowledge when that information has been relied upon in forming his or her opinion. If previously limited by the court, you must not consider this type of testimony as proof that such outside information is true but only for the purpose of assessing what credibility or weight should be given the expert witness's opinion testimony.]

NOTE ON USE

Use this written instruction if requested.

For the oral instruction to be given at the time the evidence is admitted, see WPI 6.07 (Limited Purpose Evidence—Generally).

Use the bracketed second paragraph as appropriate in order to instruct jurors as to the issues involved when experts testify based on information outside their personal knowledge. The paragraph may be modified as necessary to more specifically identify the particular testimony to which the paragraph applies. The paragraph will not be necessary if the parties did not object to any testimony beyond the expert's personal knowledge or otherwise waived the right to a limiting instruction.

COMMENT

The Legislature amended RCW 71.05 et seq. to collectively refer to mental illness and substance abuse as behavioral health disorders. See Laws of 2020, Chapter 302, § 41.

The instruction's first paragraph is taken from WPI 2.10 (Expert Testimony).

For additional discussion, see the Comments to WPI 1.06 (Evidence for Limited Purpose) and WPI 2.10 (Expert Testimony).

[Current as of January 2021.]

WPI 360.20

CONCLUDING INSTRUCTION—BEHAVIORAL HEALTH DISORDER—INVOLUNTARY TREATMENT

Upon retiring to the jury room for your deliberations, first select a presiding juror. The presiding juror shall see that your discussion is sensible and orderly, that you fully and fairly discuss the issues submitted to you, and that each of you has an opportunity to be heard and to participate in the deliberations on each question before the jury. Deliberations are to occur only in the jury room when all [twelve] jurors are present.

You are all officers of the court and must evaluate the evidence with an open mind free of bias or prejudice. If during your deliberations, you become concerned that the discussions are being influenced by preconceived bias or prejudice, you must bring this to the attention of the other jurors so that the issue may be fairly discussed among all members of the jury.

You will be given [the exhibits admitted in evidence and] these instructions.

[You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.]

[You will be provided with two special verdict forms, A and B. On verdict form A you must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before answering, and that you follow the directions exactly. Your answer to some questions will

determine whether you are to answer all, some, or none of the remaining questions. If the answer to question 1 on verdict form A is "no," then do not answer any further questions. Use verdict form B only if your answer on verdict form A, question 1, is "yes" and the remaining answers are "no." If any of questions 2 through 6 on verdict form A are answered "yes," then do not use verdict form B.]

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. However, do not assume that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If you need to ask the court a question that you have been unable to answer among yourselves after reviewing the evidence and instructions, write the question simply and clearly. The presiding juror should sign and date the question and give it to the [bailiff] [(insert other appropriate staff person)]. The court will confer with counsel to determine what answer, if any, can be given.

In your question to the court, do not indicate how your deliberations are proceeding. Do not state how the jurors have voted on any particular question or issue. Do not in any other way express your opinions about the case.

In order to answer any question on the verdict form, [ten] [five] jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as [ten] [five] jurors agree to each answer.

When you have finished answering the questions ac-

cording to the directions on the verdict form, the presiding juror must sign the form, whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the [bailiff] [(insert other appropriate staff person)] that the jury has reached a verdict, and the [bailiff] [(insert other appropriate staff person)] will bring you back into court where your verdict will be announced.

NOTE ON USE

Use WPI 360.21 (Special Verdict Form [A] (90 Days)—Behavioral Health Disorder—Involuntary Treatment) and WPI 360.22 (Special Verdict Form [A] (180 Days)—Behavioral Health Disorder—Involuntary Treatment) with this instruction.

Use the third bracketed paragraph in one of two situations:

(1) If the petitioner is not alleging that respondent is "in need of assisted outpatient treatment" and neither party wants the jury to consider this as an alternative, then only give verdict form A in WPI 360.21 (Special Verdict Form [A] (90 Days)—Behavioral Health Disorder—Involuntary Treatment) or WPI 360.22 (Special Verdict Form [A] (180 Days)—Behavioral Health Disorder—Involuntary Treatment) to the jury.

(2) If the petitioner alleges only that respondent is "in need of assisted outpatient treatment" and no other grounds, then only give verdict form B in WPI 360.23 (Special Verdict Form [B]—Behavioral Health Disorder—Involuntary Treatment—In Need of Assisted Outpatient Treatment) to the jury.

Use the fourth bracketed paragraph if the petitioner alleges that the respondent is "in need of assisted outpatient treatment" and also alleges other grounds as the basis of detention, or either party wants the jury to consider this alternative. In this instance, verdict forms A and B would be given to the jury, and the jury would use them pursuant to this instruction.

The third and fourth paragraphs should not be used together.

Use bracketed material as applicable.

COMMENT

The Legislature amended RCW 71.05 et seq. to collectively refer to

mental illness and substance abuse as behavioral health disorders. See Laws of 2020, Chapter 302, § 41.

In addition to the 2020 statutory amendments, this instruction was revised in 2018 to reflect the Court's holding in Peña-Rodriguez v. Colorado, __ U.S. __, 137 S. Ct 855, 869, 197 L.Ed.2d 107 (2017). The instruction's second paragraph reminds jurors they are responsible for ensuring their decisions are made based solely on the evidence and not upon preconceived biases or prejudices. Peña-Rodriguez, 137 S.Ct at 869 (the general rule against impeaching a jury verdict must fall when a juror has indicated he or she relied on racial animus or stereotypes in reaching the verdict). In Turner v. Stime, 153 Wn.App. 581, 222 P.3d 1243 (2009), the court concluded that statements of clear racial bias made by a juror concerning plaintiff's counsel do not "inhere in the verdict" and that it was proper for the trial court to grant a new trial upon proof that such statements were made.

For a discussion of other issues involving both conscious and unconscious bias, see the Comment to WPI 1.01 (Advance Oral Instruction—Beginning of Proceedings).

In In re Detention of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984), the court upheld an instruction allowing a verdict upon agreement by ten jurors. The court rejected the respondent's argument that involuntary commitment requires a unanimous verdict.

Special verdict forms are used in behavioral health disorder commitment cases. MPR 3.4(c). RCW 4.44.380 provides that a verdict reached by ten of the jurors becomes the verdict of the entire jury. In previous editions, this instruction included alternative language depending on whether the "same ten jurors" standard (under which the same ten jurors must agree on every question on the verdict form) or the "any ten jurors" standard (under which it is sufficient for any group of ten jurors to agree on each question) is used. These alternatives were necessary in previous editions because of a long-standing ambiguity in Washington's case law as to which of these standards applies. The Supreme Court settled this issue in 2001 when it amended CR 49(k) to adopt the "any ten jurors" standard. The instruction now reflects the "any ten jurors" standard.

[Current as of January 2021.]

WPI 360.21

SPECIAL VERDICT FORM [A] (90 DAYS)— BEHAVIORAL HEALTH DISORDER— INVOLUNTARY TREATMENT

(Insert case caption.)

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Does the respondent, (fill in name)**, have a behavioral health disorder?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If your answer to Question 1 is "no," do not answer any further questions. If your answer to Question 1 is "yes," you must then answer questions [1a], [1b], [1c], [2], [3], [4] [and] [5], as instructed below.)

[QUESTION 1a: Does the respondent, (fill in name)**, have a mental disorder?**

ANSWER: ____ **(Write "yes" or "no")]**

[QUESTION 1b: Does the respondent, (fill in name)**, have a substance use disorder?**

ANSWER: ____ **(Write "yes" or "no")]**

[QUESTION 1c: Does the respondent, (fill in name)**, have a co-occurring mental disorder and substance use disorder?**

ANSWER: ____ **(Write "yes" or "no")]**

[QUESTION 2: Is (name of respondent) **gravely disabled as a result of [his] [her] behavioral health disorder?**

ANSWER: _____ (Write "yes" or "no")]

[QUESTION 3a: Has (name of respondent)**, after having been taken into custody for evaluation and treatment, threatened, attempted or inflicted [physical harm upon] [the person of another] [or] [himself] [herself] [or] [substantial damage upon the property of another]?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If your answer to Question 3a is no, do not answer Question 3b. If your answer to Question 3a is yes, you must now answer Question 3b.)

QUESTION 3b: Does (name of respondent)**, as a result of [his] [her] behavioral health disorder, present a likelihood of serious harm to [himself] [herself] [others] [or] [the property of others]?**

ANSWER: _____ (Write "yes" or "no")]

[QUESTION 4a: Was (name of respondent) **taken into custody as a result of conduct in which [he] [she] attempted or inflicted [physical harm upon the person of another] [or] [himself] [herself] [or] [substantial damage upon the property of others]?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If your answer to Question 4a is no, do not answer Question 4b. If your answer to Question 4a is yes, you must now answer Question 4b.)

QUESTION 4b: Does (name of respondent)**, as a result of [his] [her] behavioral health disorder, continue to present a likelihood of serious harm to [himself] [herself], [others] [or] [the property of others]?**

ANSWER: _____ (Write "yes" or "no")]

[QUESTION 5a: Have criminal charges against (name of respondent) **been dismissed due to a finding of incompetence**

and has respondent been determined to be incompetent and did [he] [she] commit acts constituting a felony, specifically: (specify the felony or felonies)**?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If your answer to Question 5a is no, do not answer Question 5b. If your answer to Question 5a is yes, you must now answer Question 5b.)

QUESTION 5b: Does (name of respondent)**, as a result of [his] [her] behavioral health disorder, present a substantial likelihood of repeating similar acts?**

ANSWER: _____ (Write "yes" or "no")]

(DIRECTION: If your answers to question[s] [2], [3b], [4b], [5b] all are "no," do not answer any further questions. If your answer to any one or more of those questions is "yes," then you must proceed to answer the following question.)

QUESTION [6]: Has the petitioner proved that less restrictive treatment will not serve the best interest of (fill in the name) **or others?**

ANSWER:_____ (Write "yes" or "no")

(DIRECTION: Sign this verdict form and notify the bailiff.)

DATE: _____ _____

Presiding Juror

NOTE ON USE

Use this instruction for 90-day involuntary commitment proceedings. Under one set of circumstances, the instruction may also apply to a 180-day involuntary treatment case. See the discussion in the Comment. For other 180-day involuntary commitment proceedings, use WPI 360.22 (Special Verdict Form [A] (180 Days)—Behavioral Health Disorder—Involuntary Treatment).

Use bracketed material as applicable.

Select bracketed Questions 1a, 1b, or 1c depending on the case and renumber accordingly.

Select from among Questions 2, 3, 4, and 5 depending on the statutory grounds at issue and renumber the questions accordingly. In this regard, also make the appropriate selections from the bracketed alternatives in the directions to the jurors that follow Questions 2 and 5 above.

Do not separate Question 3a from 3b, 4a from 4b, or 5a from 5b. In each instance, the (a) and (b) sections together address one of the statutory grounds for commitment and should be considered as a single unit. For example, Questions 3a and 3b will both apply to a particular case or neither will. The (a) and (b) units are drafted separately in order to convert lengthy statutory passages into questions that will be easier for jurors to understand.

If Question 5a is being used, the jury instructions should include a separate instruction setting forth the elements of the felony or felonies, absent any element of intent, willfulness or state of mind. See the Comment to WPI 360.04 (Behavioral Health Disorder—Involuntary Treatment—90 Days).

Use WPI 360.05.02 (Less Restrictive Alternative—Behavioral Health Disorder—Involuntary Treatment—Definition) with this verdict form if necessary to define "least restrictive alternative."

Use WPI 360.20 (Concluding Instruction—Behavioral Health Disorder—Involuntary Treatment) with this verdict form.

COMMENT

RCW 71.05.280; RCW 10.77.086. The Legislature amended RCW 71.05 et seq. to collectively refer to mental illness and substance abuse as behavioral health disorders. See Laws of 2020, Chapter 302, § 41. This verdict form has been modified for this edition. No substantive change is intended.

This instruction applies to 90-day involuntary commitment proceedings. The instruction may also be used for one particular subset of 180-day hearings. In proceedings for commitment under RCW 71.05.320(1), when the grounds specified for commitment are those contained in RCW 71.05.280(3) (acts constituting a felony), an election may be made to pursue commitment of up to 90 days or up to 180 days. Under either election, the jury would be instructed using the above instruction rather than WPI 360.22 (Special Verdict Form [A] (180 Days)—Behavioral Health Disorder—Involuntary Treatment).

With regard to civil commitment of incompetent criminal defendants, see Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972).

See the discussion of Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992), in the Comments to WPI 360.04 (Behavioral Health Disorder—Involuntary Treatment—90 Days) or WPI 360.05 (Behavioral Health Disorder—Involuntary Treatment—180 Days). For a general discussion of the issues involved in drafting this instruction, see the Comment to WPI 360.04 (Behavioral Health Disorder—Involuntary Treatment—90 Days).

Under RCW 71.05.290(3), a petition brought under RCW 71.05.280(3) (acts constituting a felony) may seek commitment for a period of up to 180 days even though no previous petitions were filed for initial detention or for a 14-day detention. This statute speaks only of RCW 71.05.280(3); it does not refer to the other subsections of RCW 71.05.280. In this regard, RCW 71.05.290(3) differs from the broader language contained in the counterpart statute for acts constituting a misdemeanor, RCW 71.05.235(2). Accordingly, if a 180-day petition is brought as authorized in 71.05.290(3), and if the petition alleges not only acts constituting a felony under RCW 71.05.280(3) but also alleges one or more of the other grounds for commitment under RCW 71.05.280, then the verdict form will need to be modified so that commitment can take place only if the grounds under RCW 71.05.280(3) are found to be true.

[Current as of February 2021.]

WPI 360.22

SPECIAL VERDICT FORM [A] (180 DAYS)— BEHAVIORAL HEALTH DISORDER— INVOLUNTARY TREATMENT

(Insert case caption.)

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Does the respondent, (name of respondent), **have a behavioral health disorder?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If your answer to Question 1 is "no," do not answer any further questions. If your answer to Question 1 is "yes," you must then answer questions [1a], [1b], [1c], [2], [3], [4] [and] [5], as instructed below.)

[QUESTION 1a: Does the respondent, (fill in name), **have a mental disorder?**

ANSWER: ____ **(Write "yes" or "no")]**

[QUESTION 1b: Does the respondent, (fill in name), **have a substance use disorder?**

ANSWER: ____ **(Write "yes" or "no")]**

[QUESTION 1c: Does the respondent, (fill in name), **have a co-occurring mental disorder and substance use disorder?**

ANSWER: ____ **(Write "yes" or "no")]**

[QUESTION 2: Is (name of respondent) **gravely disabled as a result of a behavioral health disorder?**

ANSWER: _____ (Write "yes" or "no")]

[QUESTION 3a: Has (name of respondent)**, during the current period of court ordered treatment, threatened, attempted or inflicted [physical harm upon the person of another] [or] [substantial damage upon the property of another]?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: If your answer to Question 3a is no, do not answer Question 3b. If your answer to Question 3a is yes, you must now answer Question 3b.)

QUESTION 3b: Does (name of respondent)**, as a result of [his] [her] behavioral health disorder, present a likelihood of serious harm to [others] [or] [the property of others]?**

ANSWER: _____ (Write "yes" or "no")]

[QUESTION 4: Does (name of respondent)**, as a result of [his] [her] behavioral health disorder, continue to present a likelihood of serious harm to others?**

ANSWER: _____ (Write "yes" or "no")]

[QUESTION 5: Does (name of respondent)**, as a result of [his] [her] behavioral health disorder, present a substantial likelihood of repeating acts similar to** (specify felony or felonies found in previous ITA court proceedings)**?**

ANSWER: _____ (Write "yes" or "no")]

(DIRECTION: If your answers to question[s] [2], [3b], [4], [5] all are "no," do not answer any further questions. If your answer to any one or more of those questions is "yes," then you must proceed to answer the following question.)

QUESTION 6: Has the petitioner proved that less restrictive treatment will not serve the best interest of (fill in the name) **or others?**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: Sign this verdict form and notify the bailiff.)

DATE: _____ _____

Presiding Juror

NOTE ON USE

Use this instruction for 180-day involuntary commitment proceedings. For 90-day involuntary commitment proceedings, use WPI 360.21 (Special Verdict Form [A] (90 Days)—Behavioral Health Disorder—Involuntary Treatment).

The instruction is drafted under the assumption that certain elements have already been proved in a prior commitment proceeding. For the rare case in which these elements have not already been proved, the instruction will need to be modified. See the Comment below.

Use bracketed material as applicable.

Select bracketed Questions 1a, 1b, or 1c depending on the case and renumber accordingly.

Select from among Questions 2, 3, 4, and 5 depending on the statutory grounds at issue and renumber the questions accordingly. In this regard, also make the appropriate selections from the bracketed alternatives in the directions to the jurors that follow Questions 1 and 5 above.

Do not separate Question 3a from 3b. The (a) and (b) sections together address one of the statutory grounds for commitment and should be considered as a single unit. Either Questions 3a and 3b will both apply to a particular case or neither will. The (a) and (b) units are drafted separately in order to convert lengthy statutory passages into questions that will be easier for jurors to understand.

If Question 5 is being used, the jury instructions should include a separate instruction setting forth the elements of the felony or felonies, absent any element of intent, willfulness or state of mind. See the Comment to WPI 360.05 (Behavioral Health Disorder—Involuntary Treatment—180 Days).

Use WPI 360.05.02 (Less Restrictive Alternative—Behavioral Health Disorder—Involuntary Treatment—Definition) with this verdict form if necessary to define "least restrictive alternative."

Use WPI 360.20 (Concluding Instruction—Behavioral Health Disorder—Involuntary Treatment) with this verdict form.

COMMENT

RCW 71.05.320; RCW 10.77.086. The Legislature amended RCW 71.05 et seq. to collectively refer to mental illness and substance abuse as behavioral health disorders. See Laws of 2020, Chapter 302, § 41. This verdict form has been modified for this edition. No substantive change is intended.

This verdict form is for use at a 180-day involuntary commitment hearing, which will have been preceded by an earlier involuntary treatment hearing. At the 180-day hearing, the petitioner need not reprove certain elements when those elements were proved in the earlier hearing. See RCW 71.05.320(2) (the elements are those set forth in RCW 71.05.320(2)(b) and (2)(c)). The instruction above is drafted under the assumption that these elements will not need to be reproved. Practitioners should carefully review the earlier proceedings to make sure that these elements in fact have already been proved. In the rare case when these elements have not already been proved, the instruction above will need to be modified, perhaps by incorporating some of the elements from the 90-day verdict form, to address the elements more fully.

With regard to civil commitment of incompetent criminal defendants, see Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972).

See the discussion of Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992), in the Comments to WPI 360.04 (Behavioral Health Disorder—Involuntary Treatment—90 Days) or WPI 360.05 (Behavioral Health Disorder—Involuntary Treatment—180 Days). For a general discussion of the issues involved in drafting this instruction, see the Comment to WPI 360.05 (Behavioral Health Disorder—Involuntary Treatment—180 Days).

[Current as of February 2021.]

WPI 360.23

SPECIAL VERDICT FORM [B]—BEHAVIORAL HEALTH DISORDER—INVOLUNTARY TREATMENT—IN NEED OF ASSISTED OUTPATIENT TREATMENT

(Insert case caption.)

We, the jury, answer the questions submitted by the court as follows:

[Preliminary Question: Does the respondent, (name of respondent)**, have a behavioral health disorder?**

ANSWER: _____ (Write "yes" or "no")]

(DIRECTION: If your answer to the preliminary question is "no," do not answer any further questions. Sign this verdict form and notify the bailiff. If your answer to the Preliminary Question is "yes," then you must answer questions [1], [2], [3], [4] [and] [5], as instructed below.)

[QUESTION 1: As a result of a behavioral health disorder [has the respondent, (name of respondent)**, been committed by a court to detention for involuntary behavioral health treatment at least twice during the preceding thirty-six months?] [or] [is the respondent,** (name of respondent)**, currently committed for involuntary behavioral health treatment and has respondent been committed for involuntary treatment at least once during the thirty-six months preceding the date of the initial detention of the current commitment cycle?]**

ANSWER: _____ (Write "yes" or "no")]

QUESTION 2: As a result of a behavioral health disorder, is (name of respondent) **unlikely to voluntarily participate in outpatient treatment without an order for less restrictive**

treatment, in view of [his] [her] [treatment history] [or] [current behavior]?

ANSWER: _____ (Write "yes" or "no")

QUESTION 3: As a result of a behavioral health disorder, is (name of respondent) **unlikely to survive safely in the community without supervision?**

ANSWER: _____ (Write "yes" or "no")

QUESTION 4: As a result of a behavioral health disorder, is (name of respondent) **likely to benefit from less restrictive alternative treatment?**

ANSWER: _____ (Write "yes" or "no")

QUESTION 5: As a result of a behavioral health disorder, does (name of respondent) **require less restrictive treatment to prevent a relapse, decompensation, or deterioration that is likely to result in the person [presenting a likelihood of serious harm] [or] [becoming gravely disabled within a reasonably short period of time].**

ANSWER: _____ (Write "yes" or "no")

(DIRECTION: Sign this form and notify the bailiff.)

DATE: _____ _____

Presiding Juror

NOTE ON USE

Use this verdict form:

1. When the petitioner is seeking only outpatient treatment under RCW 71.05.280. Use the Preliminary Question.

or

2. When using Verdict Form A if the answers to Question 1

and any subpart are "Yes" and the remaining answers are "No." Do not use the Preliminary Question.

Use bracketed material as applicable. Use WPI 360.20 (Concluding Instruction—Behavioral Health Disorder—Involuntary Treatment) with this verdict form.

COMMENT

The Legislature amended RCW 71.05 et seq. to collectively refer to mental illness and substance abuse as behavioral health disorders. See Laws of 2020, Chapter 302, § 41. This verdict form has been modified for this edition. No substantive change is intended.

RCW 71.05.020; RCW 71.05.280; RCW 71.05.320. In 2015, the Legislature amended the Involuntary Treatment Act to provide that a person may be committed then for involuntary mental health treatment if he or she, due to a mental disorder, is in need of assisted outpatient mental health treatment. RCW 71.05.280(5).

[Current as of August 2021.]

CHAPTER 365

INVOLUNTARY TREATMENT—SEXUALLY VIOLENT PREDATORS

WPI 365.00	Introduction
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WPI 365.02	Sexually Violent Predators—Conclusion of Trial—Introductory Instruction
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WPI 365.31	Sexually Violent Predators—Conditional Release / Less Restrictive Alternative Placement (LRA)—Elements
WPI 365.33	Sexually Violent Predators—Reasonable Doubt—Less Restrictive Alternative Trial (LRA) / Conditional Release
WPI 365.34	Sexually Violent Predators—Unconditional Discharge Trial—Elements
WPI 365.37	Sexually Violent Predators—Verdict Form—Conditional Release—LRA

WPI 365.00

INTRODUCTION

The core provisions of the Sexually Violent Predator Act (SVPA),

RCW Chapter 71.09, have been found to be constitutional. In re Young, 122 Wn.2d 1, 857 P.2d 989 (1993); Seling v. Young, 531 U.S. 250, 121 S.Ct. 727, 148 L.Ed.2d 734 (2001).

Although SVPA proceedings are civil in nature, the State must meet its burden of proving the status of the respondent as a sexually violent predator beyond a reasonable doubt. RCW 71.09.060. Both parties have a right to a 12-person jury, and jury unanimity is required. RCW 71.09.050; RCW 71.09.060; Young, 122 Wn.2d at 48.

The Legislature has defined a "sexually violent predator" as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18). "Mental abnormality" and "personality disorder" are alternative means and the jury need not be unanimous as to which means has been proved, so long as substantial evidence supports each alternative. In re Detention of Halgren, 156 Wn.2d 795, 807–12, 132 P.3d 714 (2006). Of course, if there is insufficient evidence proferred as to one of these two alternatives (personality disorder or mental abnormality), the jury must not be instructed as to that alternative. Halgren, 156 Wn. 2d at 811; In re Detention of Sease, 149 Wn.App. 66, 75–79, 201 P.3d 1078 (2009).

Although certain protections consistent with criminal procedures do apply, Washington does not consider a civil commitment proceeding to be quasi-criminal; they are "resolutely civil in nature." In re Detention of Reyes, 184 Wn.2d 340, 347, 358 P.3d 394 (2015) (doctrine of structural error does not apply). Caution must be used in applying criminal jurisprudence when analyzing issues in a sexually violator predator proceeding. However, the possibility of indefinite commitment in a secure facility places at stake a vital liberty interest. In recognition of this, the Legislature provided for certain protections that do not apply in other civil cases, such as right to counsel, right to a unanimous jury, and the burden of proof beyond a reasonable doubt. RCW 71.09.050; RCW 71.09.060; Young, 122 Wn.2d at 48; see Kansas v. Hendricks, 521 U.S. 346, 372, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) (Kennedy, J., concurring) ("the practical effect of [an SVP] law may be to impose confinement for life").

The SVPA has been challenged in court numerous times, with major amendments enacted in 1995, 2001, 2005, 2009, and 2021. As a result, care must be taken to ensure that the case law relied upon is actually interpreting the current version of the statute. In addition, because a number of other states have similar SVP provisions, Washington courts have looked to federal and state opinions interpret-

ing these other statutes to assist in interpreting Washington law. See, e.g., In re Detention of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003).

The current statutory framework provides for two separate categories of trial proceedings. Within 45 days of a finding of probable cause on a commitment petition, see RCW 71.09.040, a respondent is entitled to a jury trial on the question of whether he or she is a sexually violent predator. RCW 71.09.050. The first set of instructions (and Comments) that follow in this chapter, WPI 365.01 through 365.21, are proposed for use in these initial civil commitment proceedings.

The second set of instructions, WPI 365.30 through 365.37, are proposed for use in conditional release (LRA) and unconditional discharge trials that potentially follow the initial civil commitment under the terms of RCW 71.09.090. The instructions for conditional, or unconditional, release trials are selected instructions rather than a full set. These selected instructions combine with other instructions in WPI Chapter 365 (Involuntary Treatment—Sexually Violent Predators) as required by the circumstances of the particular case.

The conditional release (LRA) procedures of the SVPA do not violate equal protection. Thorell, 149 Wn.2d 724. In *Thorell,* the Washington Supreme Court summarized the statutory shifts, including the impact of both the 1995 and 2001 amendments to the SVPA, summarized the sometimes conflicting cases interpreting the LRA provisions, and overruled In re Detention of Brooks, 145 Wn.2d 275, 36 P.3d 1034 (2001), to the extent it is inconsistent with *Thorell.*

Under *Thorell,* "those who meet the statutory definition and are committed as SVPs are not entitled to consideration of LRAs until their first annual review." Thorell, 149 Wn.2d at 751. During each annual review, DSHS must also provide the respondent with an annual written notice of the person's right to petition the court for conditional release to an LRA or unconditional discharge. If the respondent does not affirmatively waive the right to petition, the court must set a show cause hearing. RCW 71.09.090.

At the show cause hearing, the State is required to present a prima facie case (typically with the RCW 71.09.070 annual review report) demonstrating that (1) the respondent's condition has not changed sufficiently, and therefore he or she continues to meet the definition of an SVP; and (2) any proposed LRA placement is not in the respondent's best interest and the proposed LRA will not adequately protect the community. RCW 71.09.090; In re Detention of Jones, 149 Wn.App. 16, 24–30, 201 P.3d 1066 (2009). In addition, the committed person may petition for trial addressing conditional release to an LRA or unconditional release. 71.09.090(2).

A respondent is entitled to a full trial addressing either the LRA or unconditional release question, only if the court concludes that (1) the State has failed to put forward a prima facie case, (2) the respondent has made an affirmative showing establishing probable cause to believe that his or her condition has changed due to continuing participation in treatment such that the respondent is appropriate for an LRA or unconditional release, or (3) the respondent had a permanent physiological change rendering the person unable to commit a sexually violent act. In re Detention of Savala, 147 Wn.App. 798, 803, 199 P.3d 413 (2008); RCW 71.09.090(4)(b).

The court, at the show cause hearing, is not to weigh the evidence. In re Detention of Jacobson, 120 Wn.App.770, 778–81, 86 P.3d 1202 (2004) (superseded by statute on other grounds).

If the respondent is seeking conditional release to an LRA, he or she is required to propose a specific LRA that meets the six statutory requirements of RCW 71.09.092. Jones, 149 Wn.App. at 24–30. Provisions added to RCW 71.09.090 further limit the type of proof sufficient to support a new unconditional or conditional release trial.

Respondents committed under the SVPA who have satisfied the procedures of RCW 71.09.090, and who have overcome any summary judgment proceedings under RCW 71.09.094, are entitled to a trial addressing placement in an LRA and/or unconditional release. RCW 71.09.090. The protections afforded to a respondent at a commitment trial—including the right to a trial by jury and proof beyond a reasonable doubt—are equally available in an LRA or unconditional release proceeding. RCW 71.09.090.

At a trial addressing release to a proposed LRA, the State must prove, beyond a reasonable doubt, that (1) the proposed less restrictive alternative placement plan is not in the respondent's best interests, or (2) the proposed plan does not include conditions that will adequately protect the community. RCW 71.09.090; Thorell, 149 Wn.2d at 746, 751–52. If the trial addresses the unconditional release question, the State must prove that "the committed person's condition remains such that the person continues to meet the definition of a sexually violent predator." RCW 71.09.090. Evidence of the prior commitment trial and disposition is admissible. RCW 71.09.090.

If a respondent prevails at an LRA trial, the procedures for effectuating a release are set forth in RCW 71.09.096. The statute provides an additional layer of community protection by allowing the trial court to supplement the LRA conditions that were presented to the jury. The court is required to order the Department of Corrections to

investigate the proposed LRA and suggest any additional conditions. RCW 71.09.096.

The statute sets forth certain minimum requirements. The trial court is required to "impose any additional conditions necessary to ensure compliance with treatment and to protect the community." RCW 71.09.096. If the court finds that "conditions do not exist that will both ensure the person's compliance with treatment and protect the community, then the person shall be remanded to the custody of the department of social and health services for control, care and treatment in a secure facility." RCW 71.09.096(2). The timing of the release must also comply with other applicable statutes, including with regard to community notification. RCW 71.09.096(5)(b). The court is to receive monthly reports on the conditional release and is required to review the conditional release annually. RCW 71.09.096.

If the Department fails to conduct an annual review, the remedy available to a respondent is to hold a show cause hearing and not release from confinement. In re Detention of Rushton, 190 Wn.App 358, 374–378, 359 P.3d 935 (2015).

[Current as of July 2021.]

WPI 365.01

SEXUALLY VIOLENT PREDATORS—INITIAL COMMITMENT ADVANCE ORAL INSTRUCTION—VOIR DIRE

Part 1—Before Prospective Jurors are Questioned:

The State alleges that (name of respondent) is a sexually violent predator. Although this is a civil proceeding, the State must prove its case beyond a reasonable doubt and the jury must be unanimous in its decision.

You will be receiving specific instructions at the end of the case. I am giving you this preliminary instruction to assist you in answering questions during jury selection, which is sometimes called voir dire.

The purpose of this process is to make sure that we select a jury that is free from any outside or pre-existing bias that might interfere with the jury's ability to fairly decide the case based on the evidence and the law that you receive in this courtroom.

You have already met [Mr.] [Ms.] (name), our court [bailiff] [(insert other appropriate staff person)]. The [bailiff's] [(insert other appropriate staff person's)] job is to assist you. If there is anything we can do to better accommodate you as a juror, please let the [bailiff] [(insert other appropriate staff person)] know. The [bailiff] [(insert other appropriate staff person)] will involve me if that is necessary. Please follow any instructions that [he] [she] gives you.

The court clerk is [Mr.] [Ms.] (name). The clerk's job is to mark and handle exhibits and other significant papers.

[The court reporter is [Mr.] [Ms.] (name). It is the court reporter's job to take verbatim notes of the proceedings.]

[In this courtroom we record all proceedings with a

[video] [audio] recording system. All of the proceedings are preserved to create a "court record."]

This case was commenced by the filing of a petition by (name of petitioner). The petitioner is represented by (name of counsel). The petition was filed against (name of respondent), who is represented by (name of counsel).

In this proceeding, the State must prove all of the following elements beyond a reasonable doubt:

First, that (name of respondent) has been convicted of a crime of sexual violence, namely (identify crime of sexual violence);

Second, that (name of respondent) suffers from a [mental abnormality] [or personality disorder] which causes serious difficulty in controlling [his] [her] sexually violent behavior[; and]

Third, that this mental abnormality [or personality disorder] makes (name of respondent) likely to engage in predatory acts of sexual violence if not confined to a secure facility[; and]

[Fourth, that (name of respondent) has committed a recent overt act].

It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender, or disability of any party, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial. These are called "conscious biases"—and, when answering questions, it is important, even if uncomfortable for you, to share these views with the lawyers.

However, there is another more subtle tendency at work that we must all be aware of. This part of human nature is understandable but must play no role in your

service as jurors. In our daily lives, there are many issues that require us to make quick decisions and then move on. In making these daily decisions, we may well rely upon generalities, even what might be called biases or prejudices. That may be appropriate as a coping mechanism in our busy daily lives but bias and prejudice can play no part in any decisions you might make as a juror. Your decisions as jurors must be based solely upon an open-minded, fair consideration of the evidence that comes before you during trial.

In a moment, I am going to ask you some background questions and the lawyers will also have a chance to follow up with some questions of their own. Most importantly, you are to look within yourselves and see if there is anything there in your life experiences or your personal beliefs that might be such a strong influence that it would overcome your ability to serve as a fair and impartial juror. These questions may sometimes involve issues that are sensitive for you. If you are uncomfortable answering any particular question in front of the other jurors, please let me know or notify the [bailiff] [(insert other appropriate staff person)]. We may then discuss other ways to handle this question.

Before any questions are asked, an oath or affirmation will be administered. All of your answers must be open, honest, and forthright. At this time, I ask that you please rise, raise your right hand, and [I] [the clerk] will administer this oath.

> "Do you solemnly swear or affirm that you will truthfully answer such questions as may be asked of you by the court or the attorneys concerning your qualifications to act as jurors in this case? Please respond."

The fact that a petition has been filed is not to be considered by you as any indication of the truth of the allegations contained in that petition.

It is your duty as a jury to decide the facts in this case based upon the evidence presented to you during this trial. Evidence is a legal term. Evidence includes such things as testimony of witnesses, documents, or other physical objects.

During your deliberations, you must apply the law to the facts that you find to be true. It is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you think it ought to be. You are to apply the law you receive from my instructions to the facts and in this way decide the case.

(The judge explains the procedure for jury selection, and jury selection then begins.)

Part 2—After Jury is Selected:

I will now say a few words about the role and function each of us plays during a jury trial. Jury selection is important but what jurors say in jury selection is not evidence. From this point forward, it is essential that all of your decisions be based upon the evidence and the law that come to you in this courtroom and only in this courtroom.

You must not allow yourself to be exposed to any outside information about this case. Do not permit anyone to discuss or comment about it in your presence, and do not remain within hearing of such conversations. This includes electronic conversations as well as oral ones. You must keep your mind free of outside influences so that your decision will be based entirely on the evidence presented during the trial and on my instructions to you about the law.

Until you are dismissed at the end of this trial, you must avoid outside sources such as newspapers, magazines, blogs, the internet, or radio or television broadcasts which may discuss this case or issues involved in this

trial. If you start to hear or read information about anything related to the case, you must act immediately so that you no longer hear or see it. By giving this instruction I do not mean to suggest that this particular case is newsworthy; I give this instruction in every case.

During the trial, do not try to determine on your own what the law is. Do not seek out any evidence on your own. Do not consult dictionaries or other reference materials. Do not conduct any research into the facts, the issues, or the people involved in this case. This means you may not use [Google or other internet search engines] [internet resources] to look into anything at all related to this case. Do not inspect the scene of any event involved in this case. If your ordinary travel will result in passing or seeing the location of any event involved in this case, do not stop or try to investigate. You must keep your mind clear of anything that is not presented to you in this courtroom.

During the trial, do not provide information about the case to other people, including any of the lawyers, parties, witnesses, your friends, members of your family, or members of the media. If necessary, you may tell people (such as your employer or your child's daycare provider) that you are a juror and let them know when you need to be in court. If people ask you for more details, you should tell them that you are not allowed to talk about the case until it is over.

I want to emphasize that the rules prohibiting discussions include your electronic communications. You must not send or receive information about anything related to the case by any means, including by text messages, email, telephone, internet chat, blogs, or social networking web sites. Do not even mention being on a jury when using social media, such as updating your status on Facebook or sending a message on Twitter. You don't want to do anything that will invite others to talk to you about your jury duty.

In short, do not communicate with anyone, by any means, concerning what you see or hear in the courtroom, and do not try to find out more about anything related to this case, by any means, other than what you learn in the courtroom. These rules ensure that the parties will receive a fair trial. If you have any questions about these restrictions, please contact [the bailiff] [(insert other appropriate staff person)].

If you become exposed to any information other than what you learn in the courtroom, that could be grounds for a mistrial. A mistrial would mean that all of the work that you and your fellow jurors put into this trial will be wasted. Re-trials are costly and burdensome to the parties and the public. Also, if you communicate with others in violation of my orders, you could be fined or held in contempt of court.

After you have delivered your verdict, you will be free to do any research you choose and to share your experiences with others.

Remember that all phones, laptops, and other communication devices must be turned off while you are in court and while you are in deliberations.

Throughout this trial, you must come and go directly from the jury room. [Follow the [the bailiff's] [(insert other appropriate staff person's)] instructions about where to wait in the courthouse and areas that you should avoid.] Do not remain in the hall or courtroom, as witnesses and parties may not recognize you as a juror, and you may accidentally overhear some discussion about this case. Even a communication about an unrelated topic might give a bad impression to others, therefore I have instructed the lawyers, parties, and witnesses not to greet or talk to you during trial.

I want to comment on one other aspect of your role and that is the importance of keeping an open mind

throughout the various stages of these proceedings. The trial has a sensible order to it as each side presents and develops its position.

First: The lawyers will have an opportunity to make opening statements outlining the testimony of witnesses and other evidence that they expect to be presented during trial.

Next: The petitioner will present the testimony of witnesses or other evidence to you. When the petitioner has finished, the respondent may, but need not, present the testimony of witnesses or other evidence. Each witness may be cross-examined by the other side.

Next: When all of the evidence has been presented to you, I will tell you what law applies to this case. The law that applies will be set out in written instructions, which I will read out loud. You will have [individual copies of] the written instructions with you in the jury room during your deliberations.

Next: The lawyers will make closing arguments.

Finally: You will be taken to the jury room by the [bailiff] [(insert other appropriate staff person)] where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a "verdict." During your deliberations, you must apply the law that I provide to you in my instructions to the facts that you find to have been proven.

Until you are in deliberations, you must make sure you are maintaining open minds. If you were to form premature opinions about the case, this would interfere with your ability to get the benefit of each of the subsequent stages.

The attorneys' role is to represent and advocate for

the positions of their respective clients. The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. However, the lawyers' statements are not evidence or the law. The evidence is the testimony and the exhibits. The law is contained in my instructions. You must disregard anything the lawyers say that is at odds with the evidence or the law in my instructions.

You may hear objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

When there is an objection, it is my job to rule on it. One of my duties as judge is to decide whether or not evidence should be admitted during this trial. What this means is that I must decide whether or not you should consider evidence offered by the parties. For example, if a party offers a photograph as an exhibit, I will decide whether it is admissible. Do not be concerned about the reasons for my rulings. You must not consider or discuss any evidence that I do not admit or that I tell you to disregard.

Our state constitution prohibits a trial judge from making a comment on the evidence. For example, it would be improper for me to express my personal opinion about the value of a particular witness's testimony. Although I will not intentionally do so, if it appears to you that I have indicated my personal opinion concerning any evidence, you must disregard that opinion entirely. The reason for this constitutional rule is that it is solely the role of the jurors to weigh and evaluate the evidence in the case.

[You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning. You may ask questions in order to clarify the testimony, but you are not to express any opinion about

the testimony or argue with a witness. If you ask any questions, remember that your role is that of a neutral fact finder, not an advocate.]

[Before I excuse each witness, I will offer you the opportunity to write out a question on a form provided by the court. Do not sign the question. I will review the question to determine if it is legally proper.]

[There are some questions that I will not ask, or will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. If I do not ask a juror's question, or if I rephrase it, do not attempt to speculate as to the reasons and do not discuss this circumstance with the other jurors.]

[By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.]

All proceedings in this trial are recorded [by the court reporter] [through electronic means]. Deliberating juries are rarely, if ever, given access to transcripts or recordings of trial testimony. For this reason, you must pay close attention as the testimony is being presented.

The related point is that you are allowed to take notes during trial. I am not instructing you to take notes nor am I encouraging you to do so. Taking notes may interfere with your ability to listen and observe. If you choose to take notes, I must remind you to listen carefully to all testimony and to carefully observe all witnesses.

At an appropriate time, the [bailiff] [(insert other appropriate staff person)] will provide a note pad and a pen or pencil to each of you. Your juror number will be on the front page

of the note pad. You must take notes on this pad only, not on any other paper. You must not take your note pad from the courtroom or the jury room for any reason. When you recess during the trial, please (insert appropriate instruction; see Note on Use). At the end of the day, the note pads must be left (insert appropriate instruction; see Note on Use). While you are away from the courtroom or the jury room, no one else will read your notes.

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

You are not to assume that your notes are necessarily more accurate than your memory. I am allowing you to take notes to assist you in remembering clearly, not to substitute for your memory. You are also not to assume that your notes are more accurate than the memories or notes of the other jurors.

After you have reached a verdict, your notes will be collected and destroyed by the [bailiff] [(insert other appropriate staff person)]. No one will be allowed to read them.

Now that you have been empaneled as jurors, you need to take another oath. Please stand and raise your right hand and [I] [the clerk] will administer this oath.

> "Do you solemnly swear or affirm that you will well and truly try this case and render a true verdict based upon the evidence and the law? Please respond."

Having taken your oath as jurors, you are now what the law calls officers of this court. As such, you must not let your emotions overcome your rational thought process. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal

likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.

To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

Thank you for your willingness to serve this court and our system of justice.

NOTE ON USE

Use this instruction for trials concerning initial commitments as an SVP. For trials concerning conditional release (LRA) or unconditional discharge, use WPI 365.30 (Sexually Violent Predators—Conditional Release (LRA)—Unconditional Discharge—Advance Oral Instruction—Voir Dire).

This is not one of the written instructions on the law. Part 1 of this instruction is to be read to the jury panel before jury selection begins. Part 2 is to be read after jury selection has been completed. A decision must be made as to how much of this advance oral instruction, WPI 365.01, is appropriate in a particular case.

In the paragraphs addressing juror note-taking, insert an appropriate direction to jurors regarding where to leave their notes during court recesses, such as "leave your notepad on your chair" or "take your note pad with you to the jury room." Also insert an appropriate instruction regarding where jurors are to leave their note pads at the end of the day, such as "in the jury room" or "on your chair."

The instruction's paragraphs about prohibited juror communications and avoiding outside information about the trial are intended for routine cases. For a higher publicity case, the judge should consider expanding on these provisions.

The court may want to remind jurors before each recess to avoid the internet and especially to refrain from conducting internet research. See WPI 6.02 (Before Recesses).

For a discussion of the bracketed paragraphs addressing jurors' questions for witnesses, see the Comment below.

See the Note on Use for WPI 365.10 (Sexually Violent Predators—Elements for Commitment).

This instruction will need to be modified to address any of the following unusual circumstances: (1) when the first element depends not on a criminal conviction but on a finding of incompetence or insanity; (2) when the first element depends on an out-of-state conviction; or (3) when the first element depends on a criminal conviction, but the State still needs to prove sexual motivation before the offense can qualify as a crime of sexual violence.

COMMENT

This instruction is modeled after the standard advance oral instruction for civil cases as modified to fit SVP commitment cases. See WPI 1.01 (Advance Oral Instruction—Beginning of Proceedings). This instruction has been revised for this edition.

Unconscious and conscious bias. This instruction incorporates, in several places, new language concerning both unconscious and conscious bias.

In drafting the language on implicit and explicit bias, the WPI Committee carefully reviewed the preliminary oral instructions recently adopted for use in criminal cases in the United States District Court, Western District of Washington. There are slight modifications and additions designed, in part, to avoid the state constitutional provision on commenting on the evidence. Const. art. IV, § 16. The original instructions from the district court are set forth at http://www.wawd.uscourts.gov/jury/unconscious-bias (last visited September 29, 2020).

A trial court is not constitutionally-required to *sua sponte* question potential jurors about potential racial bias or to instruct on such issues. State v. Davis, 141 Wn.2d 798, 826–34, 10 P.3d 977 (2000) (death penalty case). The *Davis* court discussed the possibility of "unnecessarily bringing [issues of race] to the attention of jurors" by such inquiry when not requested by defense counsel. *Davis* relied heavily on jurisprudence from the United States Supreme Court, in particular on the death penalty case of Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), and contains a thorough review of federal case law.

The United States Supreme Court in Peña-Rodriguez v. Colorado, __ U.S. __, 137 S.Ct. 855, 869, 197 L.Ed.2d 107 (2017), concluded that

the general rule against impeaching a jury verdict must fall when a juror has indicated that he or she relied on racial animus or stereotypes in reaching the verdict. In Turner v. Stime, 153 Wn.App. 581, 222 P.3d 1243 (2009), the court concluded that statements of clear racial bias made by a juror concerning plaintiff's counsel do not "inhere in the verdict" and that it was proper for the trial court to grant a new trial upon proof that such statements were made.

The Washington Supreme Court has emphasized the dangers of racial bias impacting the fairness of a trial. For example, in State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011), the court unanimously reversed a conviction for prosecutorial misconduct in referring to an "anti-snitch code" allegedly prevalent in the African-American community, concluding that when racial bias is shown, it becomes the State's burden to show harmlessness beyond a reasonable doubt. See also City of Seattle v. Erickson, 188 Wn.2d 721, 398 P.3d 1124 (2017) (when the sole member of a racially cognizable group has been subject to a preemptory challenge by the State, a prima facie case of discriminatory purpose has been established).

Voir Dire. The term voir dire has been replaced by jury selection in several places in the instruction for the purpose of better juror comprehension. No substantive change is intended.

Questioning jurors individually. Although this is more common in criminal cases than in civil, the subject matter of the trial may make it necessary to conduct individual questioning on particularly sensitive or private matters. If a juror expresses discomfort in answering such questions in front of the entire panel or if the court determines that all jurors should be questioned individually given the subject matter, individual questioning can occur. Individual questioning may also be warranted when there is a concern that the panel may be unduly influenced by the answers of other potential jurors or if there has been substantial media interest in the case. However, the courtroom must not be closed to the public unless the *Ishikawa* factors are met and the court's findings included in the record. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982); accord State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

Absent *Ishikawa* findings on the record, the courtroom is open during individual questioning of prospective jurors to all members of the public and to the media. It is only the other jurors who are not present for the individual questioning. See State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009). It should be noted that when a juror questionnaire is used as part of jury selection, review of the completed questionnaire in chambers, as a general rule, does not violate the clear mandate of the

Washington Constitution article I, section 10 that "justice in all cases shall be administered openly." State v. Slert, 181 Wn.2d 598, 602–608, 334 P.3d 1088 (2014). Although the Supreme Court in *Slert* reversed the Court of Appeals as to its specific conclusion, the Court of Appeals decision does contain a thorough discussion of the law in this area. Slert, 169 Wn.App. 766.

The instruction includes bracketed paragraphs that deal with jurors proposing questions for witnesses. CR 43(k), as amended in 2002, requires a court to permit jury questions in all civil matters. The civil rules apply to SVP proceedings except when inconsistent with the statutory framework of RCW Chapter 71.09. See In re Detention of Williams, 147 Wn.2d 476, 488, 55 P.3d 597 (2002) (analyzing the rule for special proceedings, CR 81(a)). The SVPA is silent on the question of whether jurors should be permitted to ask questions of witnesses. Thus, on its face, it would appear that CR 43(k) applies to SVP proceedings.

[Current as of October 2020.]

WPI 365.02

SEXUALLY VIOLENT PREDATORS—CONCLUSION OF TRIAL—INTRODUCTORY INSTRUCTION

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case. The fact that the State has initiated this proceeding is not to be considered by you as any indication of the truth of the allegations.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses[, and the exhibits that I have admitted,] during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

[Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.]

In deciding this case, you must consider all of the evidence that I have admitted. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness and of the value or weight to be given to the testimony of each witness. In assessing credibility, you must avoid bias, conscious or unconscious, including bias based on religion, ethnicity, race, sexual orientation, gender or disability.

In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

The comments of the lawyers during this trial are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer. These objections should

not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a unanimous verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

NOTE ON USE

Give this instruction in every sexually violent predator case: it applies to initial commitment trials, as well as conditional release (LRA) trials and unconditional release trials. This instruction is the first of the written instructions given to the jury at the end of the trial.

COMMENT

This instruction is adapted from WPI 1.02 (Conclusion of Trial—Introductory Instruction) to fit a sexually violent predator proceeding.

[Current as of October 2020.]

WPI 365.10

SEXUALLY VIOLENT PREDATORS—ELEMENTS FOR COMMITMENT

To establish that (respondent's name) is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:

(1) That (respondent's name) has been convicted of a crime of sexual violence, namely (identify crime of sexual violence);

(2) That (respondent's name) suffers from a [mental abnormality] [or personality disorder] which causes serious difficulty in controlling [his] [her] sexually violent behavior[; and]

(3) That this [mental abnormality] [or personality disorder] makes (respondent's name) likely to engage in predatory acts of sexual violence if not confined to a secure facility[; and]

[(4) That (respondent's name) has committed a recent overt act].

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict that (respondent's name) is a sexually violent predator.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one or more of these elements, then it will be your duty to return a verdict that (respondent's name) is not a sexually violent predator.

NOTE ON USE

Use this instruction with the following instructions, as appropriate: WPI 365.11 for defining "reasonable doubt"; WPI 365.12 for defining "mental abnormality"; WPI 365.12.01 for defining "personality disorder"; WPI 365.13 for defining "predatory"; WPI 365.14 for defining

"likely to engage"; and WPI 365.16 for defining "sexual violence." There is no pattern instruction defining "secure facility." See the Comment to WPI 365.14 (Sexually Violent Predators—Likely To Engage—Definition).

In elements (2) and (3), use the bracketed "mental abnormality" and/or "personality disorder" language in accord with the evidence presented at trial. Use the bracketed element (4) only when a recent overt act must be proved. If the bracketed element (4) is used, also use WPI 365.15 (Sexually Violent Predators—Recent Overt Act—Definition).

Fill in the name of the particular crime of sexual violence where indicated. For a list of offenses that qualify as crimes of sexual violence, see the Comment to WPI 365.16 (Sexually Violent Predators—Sexual Violence—Definition).

This instruction will need to be modified to address any of the following unusual circumstances: (1) when the first element depends not on a criminal conviction but on a finding of incompetence or insanity; (2) when the first element depends on an out-of-state conviction; or (3) when the first element depends on a criminal conviction, but the State still needs to prove sexual motivation before the offense can qualify as a crime of sexual violence.

COMMENT

This instruction is similar to that approved by the Supreme Court. See In re Detention of Turay, 139 Wn.2d 379, 986 P.2d 790 (1999); In re Detention of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003). The above elements are set forth in the various RCW 71.09.020 definitions and RCW 71.09.060.

Burden of proof. Although a commitment pursuant to the Sexually Violent Predator Act is a civil commitment, RCW 71.09.060 requires that the respondent's status as a sexually violent predator be proved beyond a reasonable doubt. See generally In re Young, 122 Wn.2d 1, 857 P.2d 989 (1993).

The State is not required to prove that the respondent is "highly likely" to engage in predatory acts. Due process is satisfied by the statutory requirement that the State prove, beyond a reasonable doubt, that the respondent is likely to engage in such acts. In re Detention of Brooks, 145 Wn.2d 275, 36 P.3d 1034 (2001), overruled on other grounds by Thorell, 149 Wn.2d 724; accord Young, 122 Wn.2d at 32 n.9; Turay, 139 Wn.2d at 407–08.

Statistical likelihood of re-offending, underlying facts supporting

the petition, and expert opinions are examples of evidence that will support the "more probably than not" standard in RCW 71.09.020, fulfilling the requirement of proving dangerousness. In re Detention of Moore, 167 Wn.2d 113, 124–25, 216 P.3d 1015 (2009); see also State v. Hoisington, 123 Wn.App. 138, 147–49, 94 P.3d 318 (2004) (combination of evidence found sufficient to prove likelihood that respondent will re-offend with predatory acts of violence).

Recent overt act. The bracketed element (4) is to be used only when a recent overt act must be proved. See RCW 71.09.030; 71.09.060 (1); Henrickson v. State, 140 Wn.2d 686, 2 P.3d 473 (2000); In re Detention of Albrecht, 147 Wn.2d 1, 11, 51 P.3d 73 (2002); Paschke v. State, 121 Wn.App. 614, 90 P.3d 74 (2004). The recent overt act requirement is mandated by due process in cases in which the respondent has been released from confinement since his or her last sex offense, but before SVP proceedings are initiated, because the State must prove current dangerousness. Young, 122 Wn.2d at 40–42; In re Detention of Hovinga, 132 Wn.App. 16, 21–23, 130 P.3d 830 (2006).

Whether a respondent is incarcerated for a sexually violent offense or for a recent overt act on the date the petition is filed is a question to be determined by the court pre-trial. In re Detention of Marshall, 156 Wn.2d 150, 158, 125 P.3d 111 (2005); In re Detention of Brown, 154 Wn.App. 116, 122–29, 225 P.3d 1028 (2010). For a useful summary of "recent overt act" case law, see In re Detention of Turay, 150 Wn.2d 71, 74 P.3d 1194 (2003), which was decided on procedural grounds, and In re Detention of Fair, 167 Wn.2d 357, 362–66, 219 P.3d 89 (2009).

Serious difficulty controlling behavior. In Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), the United States Supreme Court upheld the Kansas sexual predator act—an act similar to Washington's—against a substantive due process challenge. In Kansas v. Crane, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002), the United States Supreme Court reiterated its prior rule that confinement based only on concerns that a sex offender is dangerous cannot pass constitutional muster. The Court emphasized that:

> *Hendricks* underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." That distinction is necessary lest "civil commitment" become a "mechanism for retribution or general deterrence"—functions properly those of criminal law, not civil commitment.

Crane, 534 U.S. at 412 (quoting Hendricks, 521 U.S. at 360).

The Court further commented that "civil commitment of dangerous sexual offenders will normally involve individuals who find it particularly difficult to control their behavior[.]" Crane, 534 U.S. at 414. Although total lack of ability to control behavior is not required, the Court indicated that the Constitution does not permit "commitment of the type of dangerous sexual offender considered in *Hendricks* without any lack of control determination. . . . [T]here must be proof of serious difficulty in controlling behavior." Crane, 534 U.S. at 413.

In *Thorell*, the Washington Supreme Court held that the jury is not required to make a separate finding on whether a respondent has serious difficulty controlling his or her sexually violent behavior. Nonetheless, the court suggested that "including an instruction on the serious lack of volitional control in future SVP cases will assist in appellate review and is therefore the better practice." Thorell, 149 Wn.2d at 745 n.8. A similar "best practices" recommendation was made by the Arizona Supreme Court in In re Leon G., 204 Ariz. 15, 59 P.3d 779 (2002)—a decision relied upon throughout the *Thorell* opinion.

Jury unanimity. The Legislature has defined a "sexually violent predator" as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(18). "Mental abnormality" and "personality order" are alternative means and the jury need not be unanimous as to which means has been proved, so long as substantial evidence supports each alternative. In re Detention of Halgren, 156 Wn.2d 795, 807–12, 132 P.3d 714 (2006). Of course, if there is insufficient evidence proffered as to one of these two alternatives (personality disorder or mental abnormality), the jury must not be instructed as to that alternative. Halgren, 156 Wn.2d at 811–12; In re Detention of Sease, 149 Wn.App. 66, 75–76, 201 P.3d 1078 (2009).

When evidence is proffered as to several possible personality disorders, the jury need not be unanimous as to which diagnosis is appropriate. Sease, 149 Wn.App. at 76–79.

[Current as of October 2020.]

WPI 365.11

SEXUALLY VIOLENT PREDATORS—REASONABLE DOUBT—DEFINITION

The State has filed a petition alleging that (fill in name of respondent) **is a sexually violent predator. As the petitioner, the State has the burden of proving each element beyond a reasonable doubt. There is no burden on** (fill in name of respondent) **to establish the existence of a reasonable doubt.**

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the allegations, you are satisfied beyond a reasonable doubt.]

NOTE ON USE

Use the unbracketed language in every case. For a discussion of the bracketed sentence on abiding belief, see the Comment to WPIC 4.01 (Burden of Proof—Presumption of Innocence—Reasonable Doubt).

COMMENT

The pattern instruction follows the general approach of the criminal pattern instruction that defines reasonable doubt, WPIC 4.01 (Burden of Proof—Presumption of Innocence—Reasonable Doubt). For further discussion of issues related to defining reasonable doubt, see the Comment to WPIC 4.01 (Burden of Proof—Presumption of Innocence—Reasonable Doubt).

RCW 71.09.060 requires the State to prove that the respondent is a sexually violent predator beyond a reasonable doubt. In addition, the jury must be unanimous before a verdict can be returned. RCW 71.09.060(1); In re Detention of Young, 122 Wn.2d 1, 48, 857 P.2d 989 (1993) (interpreting a prior version of the statute). However, a commitment under RCW Chapter 71.09 is civil in nature and the respondent is not afforded criminal protections "beyond those supplied in the statute and those granted in *Young*." In re Detention of Twining, 77 Wn.App. 882, 895, 894 P.2d 1331 (1995) (no error to decline to instruct that the re-

spondent is presumed not to be a sexually violent predator), overruled on other grounds by In re Detention of Pouncy, 168 Wn.2d 382, 229 P.3d 678 (2010).

The Washington Sexually Violent Predator Act has been upheld against a challenge that its real impact is punitive and that a commitment pursuant to the SVPA subjects a respondent to double jeopardy. Seling v. Young, 531 U.S. 250, 121 S.Ct. 727, 148 L.Ed.2d 734 (2001).

The Washington State Supreme Court, in the criminal context, has required the use of WPIC 4.01 (Burden of Proof—Presumption of Innocence—Reasonable Doubt) and has rejected attempts to formulate alternative definitions of reasonable doubt. State v. Bennett, 161 Wn.2d 303, 307–18, 165 P.3d 1241 (2007). The reasoning of *Bennett* is equally applicable to proceedings under RCW Chapter 71.09.

It is error to fail to define the phrase "reasonable doubt." State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977).

[Current as of October 2020.]

WPI 365.12.01

PERSONALITY DISORDER—DEFINITION

"Personality disorder" means an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.

NOTE ON USE

Use in all cases in which there is expert testimony from a psychiatrist or licensed psychologist that the respondent suffers from a personality disorder.

COMMENT

This instruction should be given in every case involving testimony from a psychiatrist or licensed psychologist diagnosing the respondent with a personality disorder. In re Detention of Pouncy, 168 Wn.2d 382, 229 P.3d 678 (2010). The Supreme Court in *Pouncy* overruled, in part, In re Detention of Twining, 77 Wn.App. 882, 894 P.2d 1331 (1995), which held that such an instruction is not required. Both *Pouncy* and *Twining* were decided before the 2009 amendment to RCW 71.09.020, which, for the first time, added a statutory definition of "personality disorder."

[Current as of October 2020.]

WPI 365.14

SEXUALLY VIOLENT PREDATORS—LIKELY TO ENGAGE—DEFINITION

"Likely to engage in predatory acts of sexual violence if not confined in a secure facility" means that the person more probably than not will engage in such acts if released [unconditionally] from detention in this proceeding.

[In determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, you may consider all evidence that bears on the issue. In considering [placement conditions or] voluntary treatment options, however, you may consider only [placement conditions or] voluntary treatment options that would exist if the respondent is [unconditionally] released from detention in this proceeding.]

NOTE ON USE

The first paragraph should be used in all cases. The bracketed word "unconditionally" should be removed when there is evidence that the respondent will be under court-imposed conditions or on community custody following release.

The bracketed second paragraph should be used when evidence of "voluntary treatment" or "placement conditions" has been introduced into evidence. Use the bracketed phrase "placement conditions" only if the evidence indicates that the respondent will be subject to court-ordered supervision, even if released on the predator petition.

If the word "unconditionally" is removed from the first paragraph, it should also be removed from the second paragraph.

COMMENT

The State need not prove that the respondent is likely to engage in predatory behavior in the foreseeable future. Rather, the State is simply required "to prove that the alleged SVP is mentally ill and currently dangerous." In re Detention of Moore, 167 Wn.2d 113, 124–25, 216 P.3d 1015 (2009). Statistical likelihood of re-offending, underlying facts supporting the petition, and expert opinions are examples of evidence that

will support the "more probably than not" standard in RCW 71.09.020, fulfilling the requirement of current dangerousness. Moore, 167 Wn.2d at 124–25; see also State v. Hoisington, 123 Wn.App. 138, 147–49, 94 P.3d 318 (2004).

In assessing respondent's risk to commit future acts of sexual violence, the finder of fact is limited to consideration of conditions that respondent would face if the SVP petition were dismissed. RCW 71.09.020(7).

Although a discussion of evidence admissibility is beyond the scope of this Comment, the above instruction allows consideration of respondent's voluntary measures to reduce his or her risk to the community and consideration of court-ordered conditions that would exist if the SVP petition were dismissed. In general, voluntary measures include things such as respondent's promise to engage in community treatment regardless of commitment status. "Conditions that would exist" are typically pre-existing community supervision conditions placed on respondent in connection with a prior criminal conviction. The *Thorell* decision includes a discussion of what evidence the finder of fact may consider. In re Detention of Thorell, 149 Wn.2d 724, 751–52, 72 P.3d 708 (2003).

Because of the possibility of juror confusion when a respondent will be subject to conditions upon release from confinement, the court may wish to remove the word "unconditionally" from the first paragraph of this instruction. A jury can consider conditions to which the respondent will be subject, such as conditions of community custody, in determining whether the respondent is likely to engage in predatory acts of sexual violence if released.

The WPI Committee recommends that the term "secure facility" not be defined for the jury. This term is relevant in a commitment proceeding only as part of the larger phrase "likely to engage in predatory acts of sexual violence if not confined in a secure facility." As discussed above, this phrase carries a particular meaning and limits jury consideration to particular types of evidence. Defining security facility outside the context of this phrase adds nothing to the commitment trial instructions. Indeed, in the context of a commitment trial, the statutory definition of secure facility is wholly circular—it includes any place (including private homes and half-way houses) where sexually violent predators are placed. RCW 71.09.020.

[Current as of October 2020.]

WPI 365.15

SEXUALLY VIOLENT PREDATORS—RECENT OVERT ACT—DEFINITION

"Recent overt act" means any act or threat or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act or behaviors.

NOTE ON USE

Use this instruction when a "recent overt act" must be proved.

COMMENT

RCW 71.09.020.

In certain circumstances, the court will make a pretrial ruling as to whether the State is required to plead and prove a recent overt act. See In re Detention of Marshall, 156 Wn.2d 150, 125 P.3d 111(2005) (pretrial ruling necessary); In re Detention of Albrecht, 147 Wn.2d 1, 51 P.3d 73 (2002), on remand, In re Detention of Albrecht, 129 Wn.App. 243, 118 P.3d 909 (2005) (recent overt act as a jury determination). For further discussion, see the Comment to WPI 365.10 (Sexually Violent Predators—Elements for Commitment). Use this instruction when a "recent overt act" is required under RCW 71.09.030 or under the due process clause. See In re Detention of Moore, 167 Wn.2d 113, 124–25, 216 P.3d 1015 (2009); In re Detention of Turay, 150 Wn.2d 71, 74 P.3d 1194 (2003); Albrecht, 147 Wn.2d 1 (evidence was sufficient to prove recent overt act when respondent offered a boy money to follow him, then attempted to grab the boy's arm; respondent was a diagnosed pedophile who had a 20-year history of sexually molesting children using the specific grooming technique that he again employed with this boy); Henrickson v. State, 140 Wn.2d 686, 2 P.3d 473 (2000); In re Detention of Broten, 115 Wn.App. 252, 62 P.3d 514 (2003); In re Detention of Davis, 109 Wn.App. 734, 37 P.3d 325 (2002).

The jury is not required to be unanimous as to whether the "recent overt act" was a threat or an actual act. In re Detention of Aston, 161 Wn.App 824, 251 P.3d 917 (2011).

[Current as of October 2020.]

WPI 365.16

SEXUALLY VIOLENT PREDATORS—SEXUAL VIOLENCE—DEFINITION

"Sexual violence" [or] ["harm of a sexually violent nature"] means: (identify the applicable crimes).

NOTE ON USE

Based on the evidence in the case, fill in the blank with the following crimes of sexual violence: (1) those with which the respondent has allegedly been charged or convicted; (2) those that the respondent is likely to commit in the future; (3) those that constituted "recent overt acts" (when proof of such an act is necessary). For predicted future offenses and "recent overt acts," the court should also give instructions defining the elements of those crimes, as well as any instructions necessary to define terms used in those instructions. See the Comment below.

Use the bracketed phrase if the court is also giving WPI 365.15 (Sexually Violent Predators—Recent Overt Act—Definition).

COMMENT

Use of instruction. This definition is relevant to three aspects of a sexually violent predator proceeding. First, the State must prove that the respondent is likely to engage in predatory acts of sexual violence in the future. Second, the State must prove that he or she has been convicted or charged with a crime of sexual violence in the past. If the State is relying on a past crime of which the respondent was not convicted, the court should follow the procedure set out in RCW 71.09.060(2). Third, the State is sometimes required to prove commission of "a recent overt act." Such an act requires either harm of a sexually violent nature or a reasonable apprehension of such harm. RCW 71.09.020. Although slightly different terms are used in different subsections of the SVPA, the terms "crime of sexual violence" and "sexually violent offense" are synonymous. In re Detention of Taylor-Rose, 199 Wn.App. 866, 874–76, 401 P.3d 357 (2017); In re Detention of Coppin, 157 Wn.App. 537, 551–54, 238 P.3d 1192 (2010).

Crimes of sexual violence. Crimes of sexual violence include crimes defined in the following instructions: WPIC 40.01 (Rape—First Degree—Definition); WPIC 44.10 (Rape of a Child—First Degree—Definition); WPIC 44.12 (Rape of a Child—Second Degree—Definition); WPIC 44.20 (Child Molestation—First Degree—Definition); and WPIC

44.22 (Child Molestation—Second Degree—Definition). The definition also includes convictions under the following repealed statutes: first degree statutory rape (former RCW 9A.44.070); second degree statutory rape (former RCW 9A.44.080); and indecent liberties against a child under age 14 (former RCW 9A.44.100(1)(b)). The definition also includes any offense under former law, or any federal or out-of-state offense, that is comparable to one of these crimes. The court will need to determine whether any such prior offenses are sufficiently comparable to warrant inclusion in the definition of "sexual violence."

A few crimes are classified as "sexually violent" offenses only if specific alternative means or additional elements are proved.

Second degree rape and indecent liberties are "sexually violent" only if committed by forcible compulsion. To define these crimes, the court can use WPIC 41.01 (Rape—Second Degree—Definition) and WPIC 49.01 (Indecent Liberties—Definition). The court should omit the bracketed language dealing with all alternatives other than forcible compulsion.

Incest is classified as a "sexually violent" offense only if the victim was under the age of 14. To define this crime, the court can use WPIC 46.03 (Incest—First Degree—Definition) and WPIC 46.05 (Incest—Second Degree—Definition), adding a requirement that the victim be under the age of 14. In re Detention of Boynton, 152 Wn.App. 442, 453–57, 216 P.3d 1089 (2009). As previously noted, indecent liberties is also "sexually violent" if the victim was under the age of 14. To define this crime, the court can use WPIC 49.01 (Indecent Liberties—Definition), omit the bracketed language regarding all alternatives, and add a requirement that the victim be under the age of 14.

Several other crimes are considered "sexually violent" only if proved beyond a reasonable doubt to have been committed with sexual motivation. For these crimes, the instruction defining the crime should be used with WPIC 2.26 (Sexual Motivation—Definition). Applicable crimes are defined in the following instructions: WPIC 26.01 (Murder—First Degree—Definition); WPIC 27.01 (Murder—Second Degree—Intentional—Definition); WPIC 27.03 (Murder—Second Degree—Felony—Definition); WPIC 35.01 (Assault—First Degree—Great Bodily Harm or Deadly Weapon—Definition); WPIC 35.03 (Assault—First Degree—Great Bodily Harm—Definition); WPIC 35.05 (Assault—First Degree—Poison—H.I.V.—Definition); WPIC 35.07 (Assault—First Degree (Alternate Means)—Deadly Weapon or Great Bodily Harm—Definition); WPIC 35.10 (Assault—Second Degree—Definition); WPIC 35.34 (Assault of a Child—First Degree—Definition); WPIC 35.36 (Assault of a Child—Second Degree—Definition); WPIC 39.01 (Kidnap-

ping—First Degree—Definition); WPIC 39.10 (Kidnapping—Second Degree—Definition); WPIC 39.15 (Unlawful Imprisonment—Definition); WPIC 60.01 (Burglary—First Degree—Definition); and WPIC 60.02.01 (Residential Burglary—Definition).

Finally, any attempt, solicitation, or conspiracy to commit one of the crimes listed above constitutes a "sexually violent offense." If there is evidence that the respondent will commit one of these anticipatory offenses, the court should use WPIC 100.01 (Attempt—Definition), WPIC 105.01 (Criminal Solicitation—Definition), or WPIC 110.01 (Criminal Conspiracy—Definition). The definitions of attempt and conspiracy will need to be modified slightly to fit the sexually violent predator proceeding. WPIC 100.01 (Attempt—Definition) would be modified to read: "A person attempts to commit a crime when . . . ." WPIC 110.01 (Criminal Conspiracy—Definition) would be modified to read: "A person commits the crime of conspiracy to commit an underlying crime when, with intent that conduct constituting the underlying crime be performed . . ."

In addition, this instruction will need to be modified, in relatively rare situations, when the initial commitment was not based on proof of conviction of a qualifying offense of sexual violence.

[Current as of October 2020.]

WPI 365.20

SEXUALLY VIOLENT PREDATORS—CONCLUDING INSTRUCTION

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you. Deliberations are to occur only in the jury room when all twelve jurors are present.

You are all officers of the court and must evaluate the evidence with an open mind free of bias or prejudice. If during your deliberations, you become concerned that the discussions are being influenced by preconceived bias or prejudice, you must bring this to the attention of the other jurors so that the issue may be fairly discussed among all members of the jury.

You will be given [the exhibits admitted in evidence,] these instructions[,] and a verdict form, which consists of one question for you to answer. In order to answer the question "yes," the jury must be satisfied beyond a reasonable doubt that "yes" is the correct answer. [Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.]

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question simply and clearly. [For this purpose, use the form provided in the jury room.] In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the [bailiff] [(insert other appropriate staff person)]. I will confer with the lawyers to determine what response, if any, can be given.

In order to reach a verdict, all jurors must agree. When you have reached a verdict, the presiding juror will fill in and sign the verdict form. The presiding juror will then inform the [bailiff] [(insert other appropriate staff person)] that you have reached a verdict. The [bailiff] [(insert other appropriate staff person)] will conduct you back into this courtroom where the verdict will be announced.

NOTE ON USE

Use in every case. Use bracketed language as appropriate.

COMMENT

This instruction is modeled after the general concluding instruction for civil cases, as modified to fit SVP commitment cases. See WPI 1.08 (Concluding Instruction—For General Verdict Form).

The second paragraph of the instruction, which encourages all members of the jury to be responsible for ensuring that decisions are made based solely on the evidence and not upon preconceived biases or prejudices. The United State Supreme Court in Peña-Rodriguez v. Colorado, __ U.S. __, 137 S. Ct 855, 869, 197 L.Ed.2d 107 (2017), concluded that the general rule against impeaching a jury verdict must fall when a juror has indicated that he or she relied on racial animus or stereotypes in reaching the verdict. In Turner v. Stime, 153 Wn.App. 581, 222 P.3d 1243 (2009), the court concluded that statements of clear

racial bias made by a juror concerning plaintiff's counsel do not "inhere in the verdict" and that it was proper for the trial court to grant a new trial upon proof that such statements were made.

For a discussion of other issues involving both conscious and unconscious bias, see the Comment to WPI 1.01 (Advance Oral Instruction—Beginning of Proceedings).

[Current as of October 2020.]

WPI 365.30

SEXUALLY VIOLENT PREDATORS—CONDITIONAL RELEASE (LRA)—UNCONDITIONAL DISCHARGE—ADVANCE ORAL INSTRUCTION—VOIR DIRE

Part 1—Before Prospective Jurors Are Questioned:

In an earlier proceeding, the respondent, (name of respondent), has been adjudicated to be a sexually violent predator. A sexually violent predator is a person who previously has been convicted of a crime of sexual violence and who suffers from a mental abnormality or personality disorder that makes it likely for the person to engage in predatory acts of sexual violence if not confined in a secure facility.

You will be receiving specific instructions at the end of the case. I am giving you this preliminary instruction to assist you in answering questions during jury selection, which is sometimes called voir dire.

The purpose of this process is to make sure that we select a jury that is free from any outside or pre-existing bias that might interfere with the jury's ability to fairly decide the case based on the evidence and the law that you receive in this courtroom.

You have already met [Mr.] [Ms.] (name), our court [bailiff] [(insert other appropriate staff person)]. The [bailiff's] [(insert other appropriate staff person's)] job is to assist you. If there is anything we can do to better accommodate you as a juror, please let the [bailiff] [(insert other appropriate staff person)] know. The [bailiff] [(insert other appropriate staff person)] will involve me if that is necessary. Please follow any instructions that [he] [she] gives you.

The court clerk is [Mr.] [Ms.] (name). The clerk's job is to mark and handle exhibits and other significant papers.

[The court reporter is [Mr.] [Ms.] (name). It is the court reporter's job to take verbatim notes of the proceedings.]

[In this courtroom we record all proceedings with a [video] [audio] recording system. All of the proceedings are preserved to create a "court record."]

(Name of respondent) has been confined at the Special Commitment Center, which is a secure facility. [(Name of respondent) has proposed an alternative placement plan for release to a less restrictive alternative. The State has the burden of proving, in this trial, that this proposed plan is not in (name of respondent's) best interests or that the proposed plan does not include conditions that will adequately protect the community.] [The State has the burden of proving that (name of respondent) continues to meet the definition of a sexually violent predator]. Although this is a civil proceeding, the State must prove its case beyond a reasonable doubt and the jury must be unanimous in its decision.

It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender, or disability of any party, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial. These are called "conscious biases"—and, when answering questions, it is important, even if uncomfortable for you, to share these views with the lawyers.

However, there is another more subtle tendency at work that we must all be aware of. This part of human nature is understandable but must play no role in your service as jurors. In our daily lives, there are many issues that require us to make quick decisions and then move on. In making these daily decisions, we may well rely upon generalities, even what might be called biases or prejudices. That may be appropriate as a coping mechanism in our busy daily lives but bias and prejudice can play no part in any decisions you might make as a juror.

Your decisions as jurors must be based solely upon an open-minded, fair consideration of the evidence that comes before you during trial.

In a moment, I am going to ask you some background questions and the lawyers will also have a chance to follow up with some questions of their own. Most importantly, you are to look within yourselves and see if there is anything there in your life experiences or your personal beliefs that might be such a strong influence that it would overcome your ability to serve as a fair and impartial juror. These questions may sometimes involve issues that are sensitive for you. If you are uncomfortable answering any particular question in front of the other jurors, please let me know or notify the [bailiff] [(insert other appropriate staff person)]. We may then discuss other ways to handle this question.

Before any questions are asked, an oath or affirmation will be administered. All of your answers must be open, honest, and forthright. At this time, I ask that you please rise, raise your right hand, and [I] [the clerk] will administer this oath.

> "Do you solemnly swear or affirm that you will truthfully answer such questions as may be asked of you by the court or the attorneys concerning your qualifications to act as jurors in this case? Please respond."

The fact that a petition has been filed is not to be considered by you as any indication of the truth of the allegations contained in that petition.

It is your duty as a jury to decide the facts in this case based upon the evidence presented to you during this trial. Evidence is a legal term. Evidence includes such things as testimony of witnesses, documents, or other physical objects.

During your deliberations, you must apply the law to

the facts that you find to be true. It is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you think it ought to be. You are to apply the law you receive from my instructions to the facts and in this way decide the case.

(The judge explains the procedure for jury selection, and jury selection then begins.)

Part 2—After Jury is Selected:

I will now say a few words about the role and function each of us plays during a jury trial. Jury selection is important but what jurors say in jury selection is not evidence. From this point forward, it is essential that all of your decisions be based upon the evidence and the law that come to you in this courtroom and only in this courtroom.

You must not allow yourself to be exposed to any outside information about this case. Do not permit anyone to discuss or comment about it in your presence, and do not remain within hearing of such conversations. This includes electronic conversations as well as oral ones. You must keep your mind free of outside influences so that your decision will be based entirely on the evidence presented during the trial and on my instructions to you about the law.

Until you are dismissed at the end of this trial, you must avoid outside sources such as newspapers, magazines, blogs, the internet, or radio or television broadcasts which may discuss this case or issues involved in this trial. If you start to hear or read information about anything related to the case, you must act immediately so that you no longer hear or see it. By giving this instruction I do not mean to suggest that this particular case is newsworthy; I give this instruction in every case.

During the trial, do not try to determine on your own

what the law is. Do not seek out any evidence on your own. Do not consult dictionaries or other reference materials. Do not conduct any research into the facts, the issues, or the people involved in this case. This means you may not use [Google or other internet search engines] [internet resources] to look into anything at all related to this case. Do not inspect the scene of any event involved in this case. If your ordinary travel will result in passing or seeing the location of any event involved in this case, do not stop or try to investigate. You must keep your mind clear of anything that is not presented to you in this courtroom.

During the trial, do not provide information about the case to other people, including any of the lawyers, parties, witnesses, your friends, members of your family, or members of the media. If necessary, you may tell people (such as your employer or your child's daycare provider) that you are a juror and let them know when you need to be in court. If people ask you for more details, you should tell them that you are not allowed to talk about the case until it is over.

I want to emphasize that the rules prohibiting discussions include your electronic communications. You must not send or receive information about anything related to the case by any means, including by text messages, email, telephone, internet chat, blogs, or social networking web sites. Do not even mention being on a jury when using social media, such as updating your status on Facebook or sending a message on Twitter. You don't want to do anything that will invite others to talk to you about your jury duty.

In short, do not communicate with anyone, by any means, concerning what you see or hear in the courtroom, and do not try to find out more about anything related to this case, by any means, other than what you learn in the courtroom. These rules ensure that the parties will receive

a fair trial. If you have any questions about these restrictions, please contact [the bailiff] [(insert other appropriate staff person)].

If you become exposed to any information other than what you learn in the courtroom, that could be grounds for a mistrial. A mistrial would mean that all of the work that you and your fellow jurors put into this trial will be wasted. Re-trials are costly and burdensome to the parties and the public. Also, if you communicate with others in violation of my orders, you could be fined or held in contempt of court.

After you have delivered your verdict, you will be free to do any research you choose and to share your experiences with others.

Remember that all phones, laptops, and other communication devices must be turned off while you are in court and while you are in deliberations.

Throughout this trial, you must come and go directly from the jury room. [Follow the [bailiff's] [(insert other appropriate staff person's)] instructions about where to wait in the courthouse and areas that you should avoid.] Do not remain in the hall or courtroom, as witnesses and parties may not recognize you as a juror, and you may accidentally overhear some discussion about this case. Even a communication about an unrelated topic might give a bad impression to others, therefore I have instructed the lawyers, parties, and witnesses not to greet or talk to you during trial.

I want to comment on one other aspect of your role and that is the importance of keeping an open mind throughout the various stages of these proceedings. The trial has a sensible order to it as each side presents and develops its position.

First: The lawyers will have an opportunity to make

opening statements outlining the testimony of witnesses and other evidence that they expect to be presented during trial.

Next: The petitioner will present the testimony of witnesses or other evidence to you. When the petitioner has finished, the respondent may, but need not, present the testimony of witnesses or other evidence. Each witness may be cross-examined by the other side.

Next: When all of the evidence has been presented to you, I will tell you what law applies to this case. The law that applies will be set out in written instructions, which I will read out loud. You will have [individual copies of] the written instructions with you in the jury room during your deliberations.

Next: The lawyers will make closing arguments.

Finally: You will be taken to the jury room by the [bailiff] [(insert other appropriate staff person)] where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a "verdict." During your deliberations, you must apply the law that I provide to you in my instructions to the facts that you find to have been proven.

Until you are in deliberations, you must make sure you are maintaining open minds. If you were to form premature opinions about the case, this would interfere with your ability to get the benefit of each of the subsequent stages.

The attorneys' role is to represent and advocate for the positions of their respective clients. The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. However, the lawyers' statements are not evidence or the law. The evidence is the testimony and the exhibits. The law is

contained in my instructions. You must disregard anything the lawyers say that is at odds with the evidence or the law in my instructions.

You may hear objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

When there is an objection, it is my job to rule on it. One of my duties as judge is to decide whether or not evidence should be admitted during this trial. What this means is that I must decide whether or not you should consider evidence offered by the parties. For example, if a party offers a photograph as an exhibit, I will decide whether it is admissible. Do not be concerned about the reasons for my rulings. You must not consider or discuss any evidence that I do not admit or that I tell you to disregard.

Our state constitution prohibits a trial judge from making a comment on the evidence. For example, it would be improper for me to express my personal opinion about the value of a particular witness's testimony. Although I will not intentionally do so, if it appears to you that I have indicated my personal opinion concerning any evidence, you must disregard that opinion entirely. The reason for this constitutional rule is that it is solely the role of the jurors to weigh and evaluate the evidence in the case.

[You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning. You may ask questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you ask any questions, remember that your role is that of a neutral fact finder, not an advocate.]

[Before I excuse each witness, I will offer you the op-

portunity to write out a question on a form provided by the court. Do not sign the question. I will review the question to determine if it is legally proper.]

[There are some questions that I will not ask, or will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. If I do not ask a juror's question, or if I rephrase it, do not attempt to speculate as to the reasons and do not discuss this circumstance with the other jurors.]

[By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.]

All proceedings in this trial are recorded [by the court reporter] [through electronic means]. Deliberating juries are rarely, if ever, given access to transcripts or recordings of trial testimony. For this reason, you must pay close attention as the testimony is being presented.

The related point is that you are allowed to take notes during trial. I am not instructing you to take notes, nor am I encouraging you to do so. Taking notes may interfere with your ability to listen and observe. If you choose to take notes, I must remind you to listen carefully to all testimony and to carefully observe all witnesses.

At an appropriate time, the [bailiff] [(insert other appropriate staff person)] will provide a note pad and a pen or pencil to each of you. Your juror number will be on the front page of the note pad. You must take notes on this pad only, not on any other paper. You must not take your note pad from the courtroom or the jury room for any reason. When you recess during the trial, please (insert appropriate instruction; see Note on Use). At the end of the day, the note pads must be left (insert

appropriate instruction; see Note on Use). While you are away from the courtroom or the jury room, no one else will read your notes.

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

You are not to assume that your notes are necessarily more accurate than your memory. I am allowing you to take notes to assist you in remembering clearly, not to substitute for your memory. You are also not to assume that your notes are more accurate than the memories or notes of the other jurors.

After you have reached a verdict, your notes will be collected and destroyed by the [bailiff] [(insert other appropriate staff person)]. No one will be allowed to read them.

Now that you have been empaneled as jurors, you need to take another oath. Please stand and raise your right hand and [I] [the clerk] will administer this oath.

> "Do you solemnly swear or affirm that you will well and truly try this case and render a true verdict based upon the evidence and the law? Please respond."

Having taken your oath as jurors, you are now what the law calls officers of this court. As such, you must not let your emotions overcome your rational thought process. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious

bias, unconscious bias, too, can affect how we evaluate information and make decisions.

To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

Thank you for your willingness to serve this court and our system of justice.

NOTE ON USE

Use this instruction for trials concerning conditional release (LRA) or unconditional discharge. For trials concerning initial commitment as an SVP, use WPI 365.01 (Sexually Violent Predators—Initial Commitment—Advance Oral Instruction—Voir Dire).

This is not one of the written instructions on the law. Part 1 of this instruction is to be read to the jury panel before jury selection begins. Part 2 is to be read after jury selection has been completed. A decision must be made as to how much of this advance oral instruction, WPI 365.30, is appropriate in a particular case.

In the eighth paragraph, the material in the first set of brackets applies in trials concerning a proposed LRA for conditional release; the material in the second set of brackets applies in trials concerning unconditional discharge.

In the paragraphs addressing juror note-taking, insert an appropriate direction to jurors regarding where to leave their notes during court recesses, such as "leave your notepad on your chair" or "take your note pad with you to the jury room." Also insert an appropriate instruction regarding where jurors are to leave their note pads at the end of the day, such as "in the jury room" or "on your chair."

The instruction's paragraphs about prohibited juror communications and avoiding outside information about the trial are intended for routine cases. For a higher publicity case, the judge should consider expanding on these provisions.

The court may want to remind the jury before each recess to avoid the internet and especially to refrain from conducting internet research. See WPI 6.02 (Before Recesses).

For a discussion of the bracketed paragraphs addressing jurors'

questions for witnesses, see the Comment for WPI 365.01 (Sexually Violent Predators—Initial Commitment—Advance Oral Instruction—Voir Dire).

See the Notes on Use for WPI 365.10 (Sexually Violent Predators—Elements for Commitment), WPI 365.31 (Sexually Violent Predators—Conditional Release / Less Restrictive Alternative Placement (LRA)—Elements), and WPI 365.34 (Sexually Violent Predators—Unconditional Discharge Trial—Elements).

COMMENT

This instruction is modeled after the standard advance oral instruction for civil cases, as modified to fit SVP commitment cases. See WPI 1.01 (Advance Oral Instruction—Beginning of Proceedings).

Unconscious and conscious bias. This instruction incorporates, in several places, language concerning both unconscious and conscious bias.

In drafting the language on implicit and explicit bias, the WPI Committee carefully reviewed the preliminary oral instructions recently adopted for use in criminal cases in the United States District Court, Western District of Washington. There are slight modifications and additions designed, in part, to avoid the state constitutional provision on commenting on the evidence. Const. art. IV, § 16. The original instructions from the district court are set forth at http://www.wawd.uscourts.gov/jury/unconscious-bias (last visited September 29, 2020).

A trial court is not constitutionally-required to *sua sponte* question potential jurors about potential racial bias or to instruct on such issues. State v. Davis, 141 Wn.2d 798, 826–34, 10 P.3d 977 (2000) (death penalty case). The *Davis* court discussed the possibility of "unnecessarily bringing [issues of race] to the attention of jurors" by such inquiry when not requested by defense counsel. *Davis* relied heavily on jurisprudence from the United States Supreme Court, in particular on the death penalty case of Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), and contains a thorough review of federal case law.

The United States Supreme Court in Peña-Rodriguez v. Colorado, __ U.S. __, 137 S.Ct. 855, 869, 197 L.Ed.2d 107 (2017), concluded that the general rule against impeaching a jury verdict must fall when a juror has indicated that he or she relied on racial animus or stereotypes in reaching the verdict. In Turner v. Stime, 153 Wn.App. 581, 222 P.3d 1243 (2009), the court concluded that statements of clear racial bias made by a juror concerning plaintiff's counsel do not "inhere in the

verdict" and that it was proper for the trial court to grant a new trial upon proof that such statements were made.

The Washington Supreme Court has emphasized the dangers of racial bias impacting the fairness of a trial. For example, in State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011), the court unanimously reversed a conviction for prosecutorial misconduct in referring to an "anti-snitch code" allegedly prevalent in the African American community, concluding that when racial bias is shown, it becomes the State's burden to show harmlessness beyond a reasonable doubt. See also City of Seattle v. Erickson, 188 Wn.2d 721, 398 P.3d 1124 (2017) (when the sole member of a racially cognizable group has been subject to a preemptory challenge by the State, a prima facie case of discriminatory purpose has been established).

Voir Dire. The term voir dire has been replaced by jury selection in several places in the instruction for the purpose of better juror comprehension. No substantive change is intended.

Questioning jurors individually. Although this is more common in criminal cases than in civil, the subject matter of the trial may make it necessary to conduct individual questioning on particularly sensitive or private matters. If a juror expresses discomfort in answering such questions in front of the entire panel or if the court determines that all jurors should be questioned individually given the subject matter, individual questioning can occur. Individual questioning may also be warranted when there is a concern that the panel may be unduly influenced by the answers of other potential jurors or if there has been substantial media interest in the case. However, the courtroom must not be closed to the public unless the *Ishikawa* factors are met and the court's findings included in the record. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982); accord State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

Absent *Ishikawa* findings on the record, the courtroom is open during individual questioning of prospective jurors to all members of the public and to the media. It is only the other jurors who are not present for the individual questioning. See State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009). It should be noted that when a juror questionnaire is used as part of jury selection, review of the completed questionnaire in chambers, as a general rule, does not violate the clear mandate of the Washington Constitution article I, section 10 that "justice in all cases shall be administered openly." State v. Slert, 181 Wn.2d 598, 602–608, 334 P.3d 1088 (2014). Although the Supreme Court in *Slert* reversed the Court of Appeals as to its specific conclusion, the Court of Appeals decision does contain a thorough discussion of the law in this area. Slert, 169 Wn.App. 766.

The WPI Committee has bracketed those paragraphs of the advance instruction that deal with jurors proposing questions for witnesses. CR 43(k) as amended in 2002 requires a court to permit jury questions in all civil matters. For a discussion of note-taking in SVP proceedings, see the Comment to WPI 365.01 (Sexually Violent Predators—Initial Commitment—Advance Oral Instruction—Voir Dire).

In some cases, respondent may be seeking unconditional discharge and, in the alternative, release to a less restrictive alternative. If a trial has been granted on both alternatives, this instruction should be modified accordingly.

In addition, if the respondent is not detained in the Special Commitment Center at the time of the current proceeding, the first sentence of the eighth paragraph will also need to be modified. Pursuant to RCW 71.09.020, a secure facility is any facility with "security measures sufficient to protect the community" and may include "total confinement facilities, secure community transition facilities, and any residence used as a court-ordered placement under RCW 71.09.096 [(LRA)]."

The statutory definition of sexually violent predator is contained in RCW 71.09.020.

The statute permits the filing of a petition when the respondent has a prior conviction for a sexually violent offense or for one of a number of enumerated offenses if committed with sexual motivation. The determination that an offense was committed with sexual motivation may be made at either the criminal trial or in the initial commitment proceeding. RCW 71.09.020. In addition, a petition may be filed when the respondent had been charged with a sexually violent offense, which was dismissed because he or she was not competent to stand trial, or when the respondent was found not guilty by reason of insanity for a sexually violent offense. See RCW 71.09.030. The phrase "previously has been convicted of a crime of sexual violence" will need to be modified, in relatively rare situations, when the initial commitment was not based on proof of conviction of a qualifying offense of sexual violence.

[Current as of October 2020.]

WPI 365.31

SEXUALLY VIOLENT PREDATORS—CONDITIONAL RELEASE / LESS RESTRICTIVE ALTERNATIVE PLACEMENT (LRA)—ELEMENTS

To establish that the respondent's proposed less restrictive alternative placement should not be granted, the State must prove one of the following beyond a reasonable doubt:

(1) That the proposed less restrictive alternative placement plan is not in (name of respondent)'s best interests; or

(2) That the proposed less restrictive alternative placement plan does not include conditions that will adequately protect the community.

[Paragraphs (1) and (2) are alternatives. To answer the question on the special verdict form "yes," you need not be unanimous as to which of these two alternatives has been proved beyond a reasonable doubt, so long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.]

[Paragraphs (1) and (2) are alternatives. The special verdict form has a separate question for each alternative. To answer either question "yes," you must unanimously agree that the alternative identified in that question has been proved beyond a reasonable doubt.]

On the other hand, if after weighing all the evidence, you have a reasonable doubt as to whether the State has met its burden of proof [on a question], then it will be your duty to answer the question "no."

NOTE ON USE

Use this instruction with the following instructions, as appropriate:

WPI 365.02 (Sexually Violent Predators—Conclusion of Trial—Introductory Instruction); WPI 365.30 (Sexually Violent Predators—Conditional Release (LRA)—Unconditional Discharge—Advance Oral Instruction—Voir Dire); WPI 365.03 (Basis of Expert Opinion—Limiting Instruction); WPI 365.04 (Opinion Testimony—Limitation on Consideration of Evidence); WPI 365.33 for defining "reasonable doubt" in a conditional release trial; WPI 365.12 for defining "mental abnormality"; WPI 365.12.01 for defining "personality disorder"; WPI 365.13 for defining "predatory"; WPI 365.14 for defining "likely to engage"; WPI 365.16 for defining "sexual violence"; use WPI 365.20 (Sexually Violent Predators—Concluding Instruction) for the concluding instruction; and WPI 365.37 (Sexually Violent Predators—Verdict Form— Conditional Release—LRA) for the verdict form.

Use the first bracketed paragraph if the court determines that the jury need not be unanimous as to means. Use the second bracketed paragraph if the court determines that the jury must be unanimous as to means. For further discussion, see the Comment below and the Comment to WPI 365.37 (Sexually Violent Predators—Verdict Form—Conditional Release—LRA).

COMMENT

This instruction is based on RCW 71.09.090; RCW 71.09.094; In re Detention of Thorell, 149 Wn.2d 724, 744, 751, 759–61, 72 P.3d 708 (2003); In re Detention of Jones, 149 Wn.App. 16, 201 P.3d 1066 (2009); In re Detention of Reimer, 146 Wn.App. 179, 190 P.3d 74 (2008); In re Detention of Bergen, 146 Wn.App. 515, 195 P.3d 529 (2008).

In State v. Halgren, 156 Wn.2d 795, 132 P.3d 714 (2006), the Supreme Court held that a respondent in an initial commitment trial can be committed as a sexually violent predator if the State can establish that the respondent suffers from either a "mental abnormality" or a "personality disorder." Accord, In re Detention of Sease, 149 Wn.App. 66, 201 P.3d 1078 (2009). The Supreme Court relied on a line of cases from criminal jurisprudence, which establishes that for alternative means crimes, so long as substantial evidence supports each means, the jury need not unanimously agree as to by which means the offense was committed. See, e.g., State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976).

The jury should only be instructed on those means for which substantial evidence has been presented. See, e.g., State v. Linehan, 147 Wn.2d 638, 642–43, 56 P.3d 542 (2002).

There have been no appellate cases addressing this issue in the context of an LRA trial. The WPI Committee was split as to whether

Halgren applies to this statute. Accordingly, the instruction includes two separate bracketed paragraphs; the trial judge may choose between the two paragraphs depending on his or her ruling on *Halgren*.

For further discussion of the form of an instruction for an "alternative means" case, see WPIC 4.23 (Elements of the Crime—Alternative Elements—Alternative Means for Committing a Single Offense—Form).

[Current as of October 2020.]

WPI 365.33

SEXUALLY VIOLENT PREDATORS—REASONABLE DOUBT—LESS RESTRICTIVE ALTERNATIVE TRIAL (LRA) / CONDITIONAL RELEASE

The State has the burden of proving beyond a reasonable doubt that the proposed less restrictive alternative placement is either: (1) not in (name of respondent)'s best interests or (2) not adequate to protect the community. (Name of respondent) has no burden of establishing that a reasonable doubt exists.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief that the proposed less restrictive alternative placement is either not in the respondent's best interests, or not adequate to protect the community, you are satisfied beyond a reasonable doubt.]

NOTE ON USE

The first paragraph of this instruction must be used in every case.

If the jury is instructed in only one of two alternatives, paragraph one of this instruction should be modified.

In the second paragraph, the court must decide whether to use the bracketed sentence referring to an abiding belief. For further discussion about the definition of reasonable doubt, see the Comment to WPIC 4.01 (Burden of Proof—Presumption of Innocence—Reasonable Doubt).

COMMENT

The State must prove beyond a reasonable doubt that the respondent should not be released on a proposed less restrictive alternative. RCW 71.09.090.

For further discussion of the burden of proof in a trial proceeding under the SVPA, see Comment to WPI 365.11 (Sexually Violent Predators—Reasonable Doubt—Definition).

[Current as of October 2020.]

WPI 365.34

SEXUALLY VIOLENT PREDATORS—UNCONDITIONAL DISCHARGE TRIAL—ELEMENTS

To establish that (name of respondent) is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:

(1) That (name of respondent) was previously found to be a sexually violent predator;

(2) That (name of respondent) continues to suffer from a [mental abnormality] [or] [personality disorder] which causes [him] [her] serious difficulty controlling [his] [her] sexually violent behavior; and

(3) The [mental abnormality] [or] [personality disorder] continues to make (name of respondent) likely to commit predatory acts of sexual violence unless confined to a secure facility.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict that respondent continues to be a sexually violent predator.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of one or more of these elements, then it will be your duty to return a verdict that the respondent is no longer a sexually violent predator.

NOTE ON USE

Use this instruction with the following instructions, as appropriate: WPI 365.02 (Sexually Violent Predators—Conclusion of Trial—Introductory Instruction); WPI 365.30 (Sexually Violent Predators—Conditional Release (LRA)—Unconditional Discharge—Advance Oral Instruction—Voir Dire); WPI 365.03 (Basis of Expert Opinion—Limiting Instruction); WPI 365.04 (Opinion Testimony—Limitation on

Consideration of Evidence); WPI 365.35 for defining "reasonable doubt" in an unconditional release trial; WPI 365.12 for defining "mental abnormality"; WPI 365.12.01 for defining "personality disorder"; WPI 365.13 for defining "predatory"; WPI 365.14 for defining "likely to engage"; WPI 365.16 for defining "sexual violence"; WPI 365.20 (Sexually Violent Predators—Concluding Instruction); and WPI 365.36 (Sexually Violent Predators—Verdict Form—Unconditional Discharge).

In elements (2) and (3), use the bracketed "mental abnormality" and/or "personality disorder" language in accord with the evidence presented at trial.

COMMENT

RCW 71.09.090(3)(c) provides as follows:

> If the issue at the hearing is whether the person should be unconditionally discharged, the burden of proof shall be upon the State to prove beyond a reasonable doubt that the committed person's condition remains such that the person continues to meet the definition of a sexually violent predator. Evidence of the prior commitment trial and disposition is admissible. The recommitment proceeding shall otherwise proceed as set forth in RCW 71.09.050 and 71.09.060.

In addition, once a respondent shows cause for a new trial under RCW 71.09.090, the respondent "is entitled to a *full* evidentiary hearing" not limited to the issues presented at the show cause hearing. In re Detention of Elmore, 162 Wn.2d 27, 38–39, 168 P.3d 1285 (2007) (emphasis in original).

The elements of "mental abnormality" or "personality disorder" are alternative means of the requirements of RCW 71.09.020(18). In re Detention of Halgren, 156 Wn.2d 795, 811, 132 P.3d 714 (2006). Juror unanimity is not required as long as substantial evidence supports both alternatives. Halgren, 156 Wn.2d at 811.

[Current as of October 2020.]

WPI 365.37

SEXUALLY VIOLENT PREDATORS—VERDICT FORM—CONDITIONAL RELEASE—LRA

(Insert case caption.)

We, the jury, answer the question submitted by the court as follows:

Has the State proved beyond a reasonable doubt that either:

(a) the proposed less restrictive alternative placement plan is not in the best interest of (name of respondent)

or

(b) the proposed less restrictive alternative placement plan does not include conditions that would adequately protect the community?

ANSWER: _____ *(Write "yes" or "no")*

(DIRECTION: Sign this verdict form and notify the bailiff.)

DATE: _____ _____

Presiding Juror

NOTE ON USE

Use this verdict form in every conditional (LRA) release trial. This verdict form should be used with WPI 365.20 (Sexually Violent Predators—Concluding Instruction).

Use this form if the trial judge determines that juror unanimity is not required for individual propositions (a) and (b), i.e., that unanimity is required only for the composite question encompassing those propositions. If, however, the trial judge determines that jurors must be unanimous as to the individual propositions, then the verdict form will need to be modified. See discussion in the Comment.

COMMENT

RCW 71.09.094(2).

In an LRA trial, the State must prove at least one of two negative propositions: (a) that the less restrictive alternative plan proposed by the sexually violent predator is not in his or her best interest, or (b) that the plan does not include conditions to adequately protect the community. RCW 71.09.090; WPI 365.31 (Sexually Violent Predators—Conditional Release / Less Restrictive Alternative (LRA)—Elements).

The pattern instruction follows the statutory verdict form set forth in RCW 71.09.094. The Legislature's verdict form presumes that juror unanimity is not required for individual propositions (a) and (b), only for the composite question that encompasses the two propositions. Appellate courts, however, have not yet ruled on how the unanimity requirements apply to LRA release trials. Accordingly, if the judge in a particular case decides that juror unanimity is required for individual propositions, rather than merely for the composite question, then the verdict form would need to be modified to separate the two propositions and to provide for two separate answers. Juror unanimity is also discussed in the Comment to WPI 365.31 (Sexually Violent Predators—Conditional Release / Less Restrictive Alternative (LRA)—Elements). The concluding instruction, WPI 365.20 (Sexually Violent Predators—Concluding Instruction), would also need minor changes.

[Current as of October 2020.]

PART XX

ALCOHOL LIABILITY

CHAPTER 370

LIABILITY FOR FURNISHING ALCOHOL

WPI 370.01	Furnishing Alcohol—Person Apparently Under the Influence of Alcohol or Obviously Intoxicated Person—Duty
WPI 370.01.01	Furnishing Alcohol—Person Apparently Under the Influence of Alcohol—Definition
WPI 370.02	Furnishing Alcohol—Obviously Intoxicated Person—Definition
WPI 370.03	Furnishing Alcohol—Person Apparently Under the Influence of Alcohol or Obviously Intoxicated Person—Burden of Proof
WPI 370.05	Furnishing Alcohol—Obviously Intoxicated Person—Assault—Burden of Proof
WPI 370.06	Commercial Vendor—Quasi-Commercial Host—Definitions
WPI 370.07	Furnishing Alcohol to Minors—Duty of Commercial Vendor
WPI 370.08	Furnishing Alcohol to Minors—Commercial Vendor—Burden of Proof
WPI 370.09	Furnishing Alcohol to Minors—Commercial Vendor—Minor Transferee
WPI 370.10	Furnishing Alcohol to Minors—Commercial Vendor—Minor Transferee—Burden of Proof
WPI 370.11	Furnishing Alcohol to Minors—Commercial Vendor—Certification Card Defense
WPI 370.12	Furnishing Alcohol to Minors—Duty of Social Host
WPI 370.13	Furnishing Alcohol to Minors—Social Host—Burden of Proof

WPI 370.01

FURNISHING ALCOHOL—PERSON APPARENTLY UNDER THE INFLUENCE OF ALCOHOL OR OBVIOUSLY INTOXICATED PERSON—DUTY

[A [commercial vendor of alcohol] [quasi-commercial host] owes a duty to third persons not to [sell] [serve] [furnish] alcohol to a person who is apparently under the influence of alcohol. [A purely social host, however, owes no such duty.]]

[A [commercial vendor of alcohol] [quasi-commercial host] owes a duty to third persons not to [sell] [serve] [furnish] alcohol to a person who is obviously intoxicated. [A purely social host, however, owes no such duty.]]

NOTE ON USE

Use the applicable paragraph in this instruction for claims that a commercial vendor or quasi-commercial host was negligent in furnishing alcohol to another. The first paragraph uses the "apparently under the influence of alcohol" standard; it is to be used in cases under RCW 66.44.200, such as cases involving injury from a drunk driving accident. The second paragraph uses the "obviously intoxicated" standard; it is to be used in cases for which the statute does not apply, such as cases involving intoxication-related assaults. For further discussion, see the Comment.

Within each paragraph, use bracketed language as applicable.

With this instruction, use either WPI 370.01.01 (Furnishing Alcohol—Person Apparently Under the Influence of Alcohol—Definition) or WPI 370.02 (Furnishing Alcohol—Obviously Intoxicated Person—Definition).

If the person to whom alcohol was furnished was a minor, also use WPI 370.07 (Furnishing Alcohol to Minors—Duty of Commercial Vendor).

For instructions on the burden of proof for claims involving the furnishing of alcohol to obviously intoxicated persons, use either WPI 370.03 (Furnishing Alcohol—Person Apparently Under the Influence of Alcohol or Obviously Intoxicated Person—Burden of Proof) or WPI 370.05

(Furnishing Alcohol—Obviously Intoxicated Person—Assault—Burden of Proof).

If there is an issue whether the defendant was a commercial vendor, a quasi-commercial host, or a purely social host, use WPI 370.06 (Commercial Vendor—Quasi-Commercial Host—Definitions).

COMMENT

Development of standards—Common law—"Obviously intoxicated." Washington has adopted the common law rule that furnishers of alcohol generally are not liable for damages caused by the intoxication of the persons they serve. E.g., Burkhart v. Harrod, 110 Wn.2d 381, 384, 755 P.2d 759 (1988); Halvorson v. Birchfield Boiler, Inc., 76 Wn.2d 759, 762, 458 P.2d 897 (1969). Exceptions to this rule exist when alcohol is furnished to a person who is obviously intoxicated, helpless, or in a special relationship with the furnisher of the alcohol. Burkhart, 110 Wn.2d at 384; Dickinson v. Edwards, 105 Wn.2d 457, 461, 716 P.2d 814 (1986); Young v. Caravan Corp., 99 Wn.2d 655, 658, 663 P.2d 834, amended 672 P.2d 1267 (1983); Wilson v. Steinbach, 98 Wn.2d 434, 438, 656 P.2d 1030 (1982).

Common law—Commercial vendors. Under these common law rules, liability may be imposed on commercial vendors for furnishing alcohol to obviously intoxicated persons. E.g., Purchase v. Meyer, 108 Wn.2d 220, 228–29, 737 P.2d 661 (1987); Young, 99 Wn.2d at 658–59. Thus, under Washington common law, a commercial vendor owes a duty not to furnish alcohol to a person who is obviously intoxicated. E.g., Estate of Kelly v. Falin, 127 Wn.2d 31, 37, 896 P.2d 1245 (1995); Christen v. Lee, 113 Wn.2d 479, 488, 780 P.2d 1307 (1989); Dickinson, 105 Wn.2d at 461; Young, 99 Wn.2d at 658.

Under these common law rules, a commercial vendor's duty was consistently described as a duty not to serve alcohol to an "obviously intoxicated" person. E.g., Christen, 113 Wn.2d at 488; Purchase, 108 Wn.2d at 225; Wilson, 98 Wn.2d at 438; Dickerson v. Chadwell, 62 Wn.App. 426, 434, 814 P.2d 687 (1991). Even though RCW 66.44.200 provides that "[n]o person shall sell any liquor to any person *apparently under the influence* of liquor," (emphasis added), the court in *Dickerson* held that it was error to instruct the jury that a commercial vendor had a duty not to serve alcohol to an apparently intoxicated person. Dickerson, 62 Wn.App. at 435. According to *Dickerson*, the statute and its "apparently under the influence" standard did not alter the well-established common law duty imposed on commercial vendors of alcohol not to serve obviously intoxicated persons.

Recent developments—Statutory standard—"Apparently

under the influence." The *Dickerson* approach was rejected by more recent cases from the Washington Supreme Court. In these cases, the court held that the "apparently under the influence" standard from RCW 66.44.200 has at least partially replaced the common law standard of obvious intoxication. See Faust v. Albertson, 167 Wn.2d 531, 538, 222 P.3d 1208 (2009); Barrett v. Lucky Seven Saloon, 152 Wn.2d 259, 274–75, 96 P.3d 386 (2004); see also Ensley v. Mollman, 155 Wn.App. 744, 230 P.3d 599 (2010).

In *Barrett*, the court held narrowly that the statutory standard replaces the common law standard only for certain categories of cases. The *Barrett* court held that the statutory standard may be used to establish civil liability only if the four-part test from the Restatement (Second) of Torts § 286 (1965) is met. Under the Restatement test, a court analyzes whether the Legislature intended the statute:

> (a) to protect a class of persons which includes the one whose interest is invaded, (b) to protect the particular interest which is invaded, (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results.

Barrett, 152 Wn.2d at 269.

The *Barrett* court applied the Restatement test and concluded that the statutory standard applies when a third-party plaintiff is injured in an automobile accident caused by a commercial host's alleged overservice of an adult patron. In so holding, the court distinguished first-party drunk driving cases and third-party assault cases, citing to cases holding that the Restatement test does not generally support application of the statutory standard in these other circumstances. Barrett, 152 Wn.2d at 270–73. For more detailed analysis of these other circumstances, see the discussion in the Comment's next section.

Thereafter, both *Faust* and *Ensley* cited *Barrett* for the broad proposition that the statutory standard has replaced the common law standard. Neither *Faust* nor *Ensley* limited this proposition to any particular category of cases and neither mentioned the Restatement test. It is thus not entirely clear whether the common law's obvious intoxication standard has been fully replaced, or has merely been replaced to the extent that the statute applies to a given case.

Both *Faust* and *Ensley* were third-party drunk driving cases, so the opinions did not require analysis of whether the common law standard had been replaced for other categories of cases. It appears unlikely that the Supreme Court intended for the brief, general statements in *Faust*

and *Ensley* to be taken as a silent rejection of *Barrett's* recent analysis of the Restatement test, especially when such a holding would leave courts without any standard to apply to the non-statutory cases. The WPI Committee thus concludes that the Supreme Court would likely still apply the common law standard to those categories of cases that do not fall under the statutory standard.

Limit on liability—Duty owed only to third parties. The duty of a commercial vendor not to furnish alcohol to an intoxicated adult patron is owed only to innocent bystanders injured or killed by the obviously intoxicated patron; it is not owed to intoxicated adult patrons who are injured due to their own intoxication. Estate of Kelly, 127 Wn.2d at 37–42. The scope of the duty of a commercial vendor not to furnish alcohol to a minor, whether or not the minor was obviously intoxicated or apparently under the influence of alcohol, is more expansive. See Comment to WPI 370.07 (Furnishing Alcohol to Minors—Duty of Commercial Vendor).

Limit on liability—Assaults. Lawsuits by innocent bystanders against commercial vendors for furnishing alcohol to intoxicated persons most often involve drunk driving accidents, see Estate of Kelly, 127 Wn.2d at 37, but liability may also attach in the context of a criminal assault, if the criminal assault was a foreseeable result of furnishing intoxicating liquor to an obviously intoxicated patron. See Christen, 113 Wn.2d at 491–98; Cox v. Keg Rests., 86 Wn.App. 239, 247, 935 P.2d 1377 (1997). A criminal assault, however:

> is not a foreseeable result of furnishing intoxicating liquor to an obviously intoxicated person, unless the drinking establishment which furnished the intoxicating liquor had some notice of the possibility of harm from prior actions of the person causing the injury, either on the occasion of the injury, or on previous occasions.

Christen, 113 Wn.2d at 498.

Social hosts. Unlike commercial vendors, social hosts are not potentially liable for serving intoxicated adults. The Washington Supreme Court has declined to impose common law liability on purely social hosts. In Burkhart v. Harrod, 110 Wn.2d 381, 388, 390, 755 P.2d 759 (1988), the court held that, absent future legislative action to impose such social host liability, a social host who provides alcohol to an "obviously intoxicated" guest may not be held liable for damages caused by that intoxication. Likewise, social hosts have no liability under the statute, which applies only to the sale of alcohol by commercial vendors. See RCW 66.44.200.

Quasi-commercial hosts. The court has indicated, however, that

common law liability for furnishing liquor to obviously intoxicated persons may be imposed on "quasi-commercial hosts, i.e., those who did not sell alcohol, but who otherwise had business interests in furnishing alcohol to their guests." Burkhart, 110 Wn.2d at 384; see also Fairbanks v. J.B. McLoughlin Co., Inc. 131 Wn.2d 96, 929 P.2d 433 (1997) (banquet-hosting employer may be liable for injuries to third persons proximately caused by intoxication of employee who became intoxicated at the banquet); Dickinson, 105 Wn.2d at 466 (when presence of banquet-hosting employer's management suggested that employer could have ordered service to be denied to intoxicated employee, genuine issue of material fact existed as to whether employer could be held liable to injured third person for furnishing alcohol to obviously intoxicated employee).

The status of common law liability for quasi-commercial hosts is not entirely clear in light of the broad statements in *Faust* and *Ensley* about the common law standard having been replaced by the statutory standard. Also, it appears that RCW 66.44.200 does not apply to quasi-commercial hosts, because the statute applies only to the sale of alcohol, whereas quasi-commercial hosts are by definition those who furnish alcohol free of charge in connection with some other business purpose. See the Comment to WPI 370.06 (Commercial Vendor—Quasi-Commercial Host—Definitions).

[Current as of February 2021.]

WPI 370.01.01

FURNISHING ALCOHOL—PERSON APPARENTLY UNDER THE INFLUENCE OF ALCOHOL—DEFINITION

A person is apparently under the influence of alcohol if that influence is readily perceptible to a reasonable person.

Whether a person is apparently under the influence of alcohol is to be determined by the person's appearance to others at the time the alcohol was [sold] [served] [furnished] to the person. [The appearance of a person a short period of time after the person was [sold] [served] [furnished] alcohol may be considered by you in determining whether the person was [sold] [served] [furnished] alcohol while apparently under the influence of alcohol.]

[Evidence of the amount of alcohol consumed or evidence of blood alcohol content may be considered by you, along with other evidence, in determining whether the person was [sold] [served] [furnished] alcohol while apparently under the influence of alcohol. [However, neither evidence of the amount of alcohol consumed, nor evidence of the person's blood alcohol level, is sufficient by itself to establish that the person was [sold] [served] [furnished] alcohol while apparently under the influence of alcohol.]]

NOTE ON USE

Use this instruction when there is a claim that alcohol was provided to a person apparently under the influence of alcohol. Use bracketed language as applicable.

COMMENT

The instruction's first paragraph is based on Barrett v. Lucky Seven Saloon, 152 Wn.2d 259, 268, 96 P.3d 386 (2004); see also Ensley v. Mollman, 155 Wn.App. 744, 230 P.3d 599 (2010).

In Faust v. Albertson, 143 Wn.App. 272, 178 P.3d 358 (2008), reversed on other grounds, 167 Wn.2d 531, 222 P.3d 1208 (2009), the Court of Appeals held that "apparently intoxicated" equates to "seemingly drunk," and did not use the "readily perceptible" language from *Barrett*. On appeal, the Washington Supreme Court held circumstantial evidence that a tortfeasor was apparently under the influence post-service may be submitted to the trier of fact when such firsthand observations occur within a short period of time after the alleged overservice. Faust, 167 Wn.2d at 540–41. Further, blood alcohol content of the tortfeasor is relevant to support and corroborate the credibility of firsthand observations of the tortfeasor's appearance, but is not alone sufficient to prove apparent intoxication at the time of service. Faust, 167 Wn.2d at 542.

Additionally, the Washington Supreme Court affirmed the public policy that the standard of proving obvious or apparent intoxication must be based on firsthand observations, not assumptions. Faust, 167 Wn.2d at 539–41. Jurors should not be allowed to infer intoxication based on the tortfeasor's blood alcohol content alone. A person's level of intoxication must be judged at the time of service, because "underlying physiological science reflect[s] that not all drinkers will appear drunk at certain levels of alcohol consumption . . . ." Faust, 167 Wn.2d at 541. See also the Comment to WPI 370.02 (Furnishing Alcohol—Obviously Intoxicated Person—Definition) (discussing requirement that firsthand observations take place within a short period of time after service).

[Current as of February 2021.]

WPI 370.02

FURNISHING ALCOHOL—OBVIOUSLY INTOXICATED PERSON—DEFINITION

A person is obviously intoxicated if the person's appearance and behavior would lead a reasonable observer to conclude that the person is certainly or unmistakably intoxicated. [Intoxication means an alcohol-induced impairment of a person's mental and bodily condition.]

Whether a person was obviously intoxicated or not is to be determined by the person's appearance to others at the time the alcohol was [sold] [served] [furnished] to the person. [The appearance of a person a short period of time after the person was [sold] [served] [furnished] alcohol may be considered by you in determining whether the person was [sold] [served] [furnished] alcohol while obviously intoxicated.]

[Evidence of the amount of alcohol consumed or evidence of blood alcohol content may be considered by you, along with other evidence, in determining whether the person was [sold] [served] [furnished] alcohol while apparently under the influence of alcohol. [However, neither evidence of the amount of alcohol consumed, nor evidence of the person's blood alcohol level, is sufficient by itself to establish that the person was [sold] [served] [furnished] alcohol while obviously intoxicated.]]

NOTE ON USE

Use this instruction when a person's obvious intoxication is in issue. Use bracketed material as applicable.

COMMENT

The first sentence of the paragraph is based on Barrett v. Lucky Seven Saloon, 152 Wn.2d 259, 268, 96 P.3d 386 (2004), in which the Supreme Court held that the term "obviously" intoxicated means "unmistakably" or "certainly" intoxicated. The second sentence is based

on State v. Zamora, 6 Wn.App. 130, 132, 491 P.2d 1342 (1971) ("Intoxication 'refers to an impaired mental and bodily condition which may be produced either by alcohol, which is a drug, or by any other drug.' " (citing additional cases)). The WPI Committee believes that this paragraph more clearly describes the current legal standard than did the previous version, which read: "A person is obviously intoxicated if the person is so intoxicated that he or she is effectively deprived of will power or responsibility for his or her own actions."

> Whether a person is obviously intoxicated or not is to be determined by the person's appearance to others around him or her at the time the intoxicating liquor is furnished to that person. Evidence of the amount of alcohol consumed is not sufficient by itself to establish that a person was furnished intoxicating liquor while obviously intoxicated.

Christen v. Lee, 113 Wn.2d 479, 487, 780 P.2d 1307 (1989). But see Dickinson v. Edwards, 105 Wn.2d 457, 465, 716 P.2d 814 (1986) (admitted fact that the person was served between 15 and 20 drinks in a three and one-half hour period raised a material factual issue as to whether the person would have displayed some outward manifestation of intoxication before ordering and whether defendants knew or should have known that the person was intoxicated) (distinguished as "factually unique" in Purchase v. Meyer, 108 Wn.2d 220, 227, 737 P.2d 661 (1987)).

"[N]either the results of a blood alcohol test nor the appearance of a person a substantial time after the intoxicating liquor was served constitutes sufficient evidence of obvious intoxication." Christen, 113 Wn.2d at 488–89; accord, Purchase, 108 Wn.2d at 226; Wilson v. Steinbach, 98 Wn.2d 434, 439, 656 P.2d 1030 (1982); Barrie v. Hosts of America, Inc., 94 Wn.2d 640, 643 n.1, 618 P.2d 96 (1980); Shelby v. Keck, 85 Wn.2d 911, 915, 541 P.2d 365 (1975); Williams v. Kingston Inn, 58 Wn.App. 348, 792 P.2d 1282 (1990).

Although blood alcohol evidence is not sufficient by itself to prove obvious intoxication, the Court of Appeals has held that blood alcohol test results may be admitted under an abuse of discretion standard when the test results enhance the credibility of eyewitnesses who testified as to the person's obvious intoxication. Cox v. Keg Rests., 86 Wn.App. 239, 248–50, 935 P.2d 1377 (1997).

The Supreme Court has not yet directly addressed the admissibility of blood alcohol evidence to prove obvious intoxication, see Estate of Kelly v. Falin, 127 Wn.2d 31, 42 n.4, 896 P.2d 1245 (1995), but the rationale of the Supreme Court in several cases suggests that the Supreme

Court would reach the same conclusion as the Court of Appeals. See, e.g., Faust v. Albertson, 167 Wn.2d 531, 539–42, 222 P.3d 1208 (2009) (reaching this conclusion in the closely related context of the "apparently under the influence" standard); Christen, 113 Wn.2d 479 (a blood alcohol test is not by itself sufficient evidence of obvious intoxication).

A police officer's subjective observation that a person was obviously intoxicated shortly after the person left the place where the person was served alcohol may raise an inference that the person was obviously intoxicated at the time of service, provided that the person did not consume any alcohol after leaving and provided there is no unaccounted-for time between the person's departure and the police officer's subsequent observation. Fairbanks v. J.B. McLoughlin Co. Inc., 131 Wn.2d 96, 103, 929 P.2d 433 (1997); Dickinson, 105 Wn.2d at 464.

[Current as of February 2021.]

WPI 370.03

FURNISHING ALCOHOL—PERSON APPARENTLY UNDER THE INFLUENCE OF ALCOHOL OR OBVIOUSLY INTOXICATED PERSON—BURDEN OF PROOF

[On (name of plaintiff)'s claim that (name of defendant) was negligent in [selling] [serving] [furnishing] alcohol to (name of person),] (name of plaintiff) has the burden of proving each of the following propositions:

(1) That (name of defendant) was a [commercial vendor of alcohol] [or] [quasi-commercial host];

(2) That (name of defendant) [sold] [served] [furnished] alcohol to (name of person);

(3) That (name of person) was [apparently under the influence of alcohol] [obviously intoxicated] at the time (name of defendant) [sold] [served] [furnished] [him] [her] the alcohol; and

(4) That the [sale] [service] [furnishing] of alcohol to (name of person) while [he] [she] was [apparently under the influence of alcohol] [obviously intoxicated] was a proximate cause of (name of plaintiff or decedent)'s [injury] [death].

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for (name of defendant) [on this claim].

NOTE ON USE

Use this instruction with WPI 370.01 (Furnishing Alcohol—Person Apparently Under the Influence of Alcohol or Obviously Intoxicated Person—Duty).

Use the bracketed material as applicable. If the furnishing of alcohol to an intoxicated person is the only claim in the case, do not use the bracketed language in the first and last paragraphs.

If the issue in the case involves a criminal assault by an obviously intoxicated patron, use WPI 370.05 (Furnishing Alcohol—Obviously Intoxicated Person—Assault—Burden of Proof) instead of this instruction.

Use WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence) with this instruction.

[Current as of February 2021.]

WPI 370.05

FURNISHING ALCOHOL—OBVIOUSLY INTOXICATED PERSON—ASSAULT—BURDEN OF PROOF

[On (name of plaintiff)'s claim that (name of defendant) was negligent in [selling] [serving] [furnishing] alcohol to (name of person),] (name of plaintiff) has the burden of proving each of the following propositions:

(1) That (name of defendant) was a [commercial vendor of alcohol] [or] [quasi-commercial host];

(2) That (name of defendant) [sold] [served] [furnished] alcohol to (name of person);

(3) That (name of person) was obviously intoxicated at the time (name of defendant) [sold] [served] [furnished] [him] [her] the alcohol;

(4) That (name of defendant), at the time it [sold] [served] [furnished] the alcohol, had notice of the possibility of violent conduct and subsequent harm from the actions of (name of person) before or at the time of the [sale] [service] [furnishing]; and

(5) That the [sale] [service] [furnishing] of alcohol to (name of person) while [he] [she] was obviously intoxicated was a proximate cause of (name of plaintiff or decedent)'s [injury] [death].

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for (name of defendant) [on this claim].

NOTE ON USE

Use this instruction only if the claim of furnishing alcohol to an obviously intoxicated person involves harm from a criminal assault by the intoxicated person. Use WPI 370.01 (Furnishing Alcohol—Person Apparently Under the Influence or Obviously Intoxicated Person—Duty) and WPI 370.04 (Furnishing Alcohol—Obviously Intoxicated Person—Assault) with this instruction.

Use the bracketed language as applicable. If the furnishing of alcohol to an obviously intoxicated person is the only claim in the case, do not use the bracketed language in the first and last paragraphs.

Use WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence) with this instruction.

COMMENT

Pursuant to the analysis in Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 96 P.3d 386 (2004), alcohol-related criminal assault cases may still be governed by the common law standard of "obviously intoxicated" rather than by the statutory standard of "apparently under the influence." See further discussion in the Comment to WPI 370.01 (Furnishing Alcohol—Person Apparently Under the Influence or Obviously Intoxicated Person—Duty).

Before liability can be imposed on a commercial vendor for breach of the duty not to serve an obviously intoxicated patron, it must be established that the resulting harm was foreseeable. Christen v. Lee, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989).

> A criminal assault may be a foreseeable result of furnishing intoxicating liquor to an obviously intoxicated person, but only if the drinking establishment which furnished the intoxicating liquor had some notice of the possibility of harm from prior actions of the person causing the injury, either on the occasion of the injury or on previous occasions.

Christen, 113 Wn.2d at 491; see also Mortensen v. Moravec, 1 Wn.App.3d 608, 406 P.3d 1178 (2017) (holding that the duty of an alcohol seller not to serve an obviously intoxicated person does not extend to a third person injured by the intoxicated person's criminal assault, even if accidental, unless the alcohol seller had notice of the possibility of harm based on the intoxicated person's actions).

A drinking establishment's awareness that a person possesses a

knife or other weapon does not by itself provide such notice; there must be some action on the part of that person indicating that he or she may actually use such a weapon. Christen, 113 Wn.2d at 491; cf. Cox v. Keg Rests., 86 Wn.App. 239, 251, 935 P.2d 1377 (1997) (evidence that person was yelling and banging on the phone approximately 90 minutes before the assault, that person appeared "tipsy," and that person was served three shots of whiskey and three beers after the manager observed the unruly behavior was sufficient to give rise to an inference that vendor served person while he was obviously intoxicated and had notice of a possibility of harm).

Similar principles apply outside the commercial context. An adult who provides beer for a "kegger" is not liable for harm suffered when juvenile attendees assault another juvenile attendee, unless the assailants give "some notice that they, as individuals, [are] likely to become violent." Cameron v. Murray, 151 Wn.App. 646, 656, 214 P.3d 150 (2009).

Instructions that contain both the "notice of a possibility of harm" and "obviously intoxicated" elements implicitly explain the issue of foreseeability and accurately apprise the jury of the commercial vendor's duty. Cox, 86 Wn.App. at 251–52.

The liability of a drinking establishment for a criminal assault by one of its patrons may involve not only its duty not to serve alcohol to obviously intoxicated persons, but also its duty to properly supervise its premises. See Christen, 113 Wn.2d at 497–98, 504–09. For more information concerning this premises duty, see WPI 120.06.03 (Duty to Business Invitee—Protection from Criminal Acts).

[Current as of February 2021.]

WPI 370.06

COMMERCIAL VENDOR—QUASI-COMMERCIAL HOST—DEFINITIONS

[A commercial vendor of alcohol is one who is engaged in the commercial sale of alcohol.]

[A quasi-commercial host is a host who did not sell alcohol, but had a business interest, as opposed to a purely social interest, in furnishing alcohol to [his] [her] [its] guests.]

NOTE ON USE

Use this instruction only if there is a factual issue as to whether the defendant was a commercial vendor, a quasi-commercial host, or a purely social host.

COMMENT

The first bracketed paragraph is drawn from the first element of a burden of proof instruction approved in Cox v. Keg Rests., 86 Wn.App. 239, 252 n.6, 935 P.2d 1377 (1997).

The second bracketed paragraph is drawn from Burkhart v. Harrod, 110 Wn.2d 381, 384, 755 P.2d 759 (1988), in which the court distinguished between quasi-commercial hosts and purely social hosts and defined quasi-commercial hosts as "those who did not sell alcohol but who otherwise had business interests in furnishing alcohol to their guests." See also Christen v. Lee, 113 Wn.2d 479, 494, 780 P.2d 1307 (1989).

[Current as of February 2021.]

WPI 370.07

FURNISHING ALCOHOL TO MINORS—DUTY OF COMMERCIAL VENDOR

A commercial vendor of alcohol owes a duty to take reasonable precautions not to [sell] [serve] [furnish] alcohol to a minor. A minor [, for purposes of this instruction,] is a person under the age of twenty-one. [A commercial vendor of alcohol owes this duty to the minor who seeks to obtain the alcohol, to other minors with whom it is foreseeable the minor will share the alcohol, and to third persons who sustain foreseeable alcohol-related injuries as a result of the [sale] [service] [furnishing] of alcohol to the minor or the minor's sharing of it with other minors.]

The duty of a commercial vendor to take reasonable precautions not to furnish alcohol to a minor requires the vendor to check the person's identification, and, if still in doubt about the person's true age, to either refuse to [sell] [serve] [furnish] the person alcohol, or have the person sign a certification card and record an accurate description and serial number of the person's identification on the certification card.

NOTE ON USE

Use this instruction for claims that a commercial vendor of alcohol was negligent in furnishing alcohol to a minor. Use bracketed language as applicable. Use this instruction with WPI 370.08 (Furnishing Alcohol to Minors—Commercial Vendor—Burden of Proof) or WPI 370.10 (Furnishing Alcohol to Minors—Commercial Vendor—Minor Transferee—Burden of Proof). If there is a claim that the minor to whom alcohol was furnished was obviously intoxicated or was apparently under the influence of alcohol, also use WPI 370.01 (Furnishing Alcohol—Person Apparently Under the Influence of Alcohol or Obviously Intoxicated Person—Duty).

If the case involves a transfer of alcohol from a purchasing minor to other minors, also use WPI 370.09 (Furnishing Alcohol to Minors—Commercial Vendor—Minor Transferee) with this instruction. If the negligence of a minor purchaser for sharing alcohol with other minors is

in issue, also use WPI 370.12 (Furnishing Alcohol to Minors—Duty of Social Host).

If contributory negligence of a minor purchaser or a minor transferee is asserted as a defense, use the appropriate instructions contained in WPI Chapter 11 (Contributory Negligence and Imputed Negligence), WPI Chapter 12 (Specific Factors Affecting Negligence and Contributory Negligence), WPI Chapter 16 (Defenses), and/or WPI Chapter 60 (Statutory Violations). If RCW 66.44.210 is asserted as a defense, use WPI 370.11 (Furnishing Alcohol to Minors—Commercial Vendor—Certification Card Defense).

COMMENT

The duty and its source. After Congress repealed Prohibition, the Washington Legislature enacted the Washington Alcoholic Beverage Control Act, also known as the Washington State Liquor Law. Among other things, the Act makes it a crime to sell, give, or otherwise supply alcohol to a minor, i.e., a person under the age of twenty-one. RCW 66.44.270(1); RCW 66.44.310.

Although the Legislature has been silent on the issue of civil liability for furnishing alcohol to minors, Washington courts have held that a commercial vendor of alcohol has a duty to take reasonable precautions not to serve alcohol to a minor and whether the vendor took reasonable precautions to determine the age of its customer is a question of fact. Young v. Caravan Corp., 99 Wn.2d 655, 660–61, 663 P.2d 834 (1983), amended 672 P.2d 1267 (1983); Callan v. O'Neil, 20 Wn.App. 32, 40, 578 P.2d 890 (1978).

Using Restatement (Second) of Torts section 286, the courts have concluded that the criminal provisions of the Washington State Liquor Law prohibiting vendors from selling or furnishing alcohol to minors creates a standard of care that, when breached, can be considered by the trier of fact as evidence of negligence. Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 473, 951 P.2d 749 (1998); see also Crowe v. Gaston, 134 Wn.2d 509, 951 P.2d 1118 (1998); Purchase v. Meyer, 108 Wn.2d 220, 737 P.2d 661 (1987); Young, 99 Wn.2d at 660–61; Torres v. Salty Sea Days, Inc., 36 Wn.App. 668, 676 P.2d 512 (1984); Callan, 20 Wn.App. at 40.

Although some of these cases made reference to negligence per se (e.g., *Purchase*, *Young*, *Callan*, and *Torres*), after the enactment of RCW 5.40.050, the violation of statutes prohibiting the furnishing of alcohol to minors may be considered only as evidence of negligence. Schooley, 134 Wn.2d at 473 n.1.

To whom the duty is owed. To date, Washington courts have found that the following persons have a cause of action in negligence against a commercial vendor who sells or furnishes alcohol to a minor: (1) an injured intoxicated minor purchaser, Young, 99 Wn.2d at 660; (2) third persons injured by the intoxicated minor purchaser, Purchase, 108 Wn.2d at 228; (3) other injured intoxicated minors with whom it was foreseeable the minor purchaser would share the alcohol, Schooley, 134 Wn.2d at 483; and (4) third persons injured by an intoxicated minor with whom the minor purchaser foreseeably shared the alcohol, Crowe, 134 Wn.2d at 516–17.

How the duty is fulfilled. Under RCW 66.20.180, a commercial vendor, in order to determine whether or not a buyer is of legal age to purchase alcohol, may request the buyer to present identification. According to the court in Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 481, 951 P.2d 749 (1998), "all the vendor has to do is ask the purchaser for valid identification in order to verify that he or she is of legal age to purchase alcohol." And, according to the court in Crowe v. Gaston, 134 Wn.2d 509, 518, 951 P.2d 1118 (1998), "[t]he alcohol vendor is simply required to check the buyer's identification."

Under RCW 66.20.190, in addition to checking the buyer's identification, the vendor, if still in doubt about the buyer's true age, shall require the buyer to sign a certification card complying with the statutory requirements, which include recording an accurate description and serial number of the buyer's identification on the certification card. According to the court in Crowe v. Gaston, 134 Wn.2d 509, 519, 951 P.2d 1118 (1998), "[i]f the vendor completes this step the vendor is immune from any criminal or civil liability regarding the sale of alcohol to the minor." See also Schooley, 134 Wn.2d at 481; RCW 66.20.210.

Limitations on liability. The liability of a commercial vendor for negligently furnishing alcohol to a minor is not limitless. First, the concept of foreseeability determines the scope of the duty owed. Schooley, 134 Wn.2d at 477, 481; Christen v. Lee, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989). Thus, an alcohol vendor will be responsible only for the foreseeable consequences of its negligent sale of alcohol. Schooley, 134 Wn.2d at 481.

Second, "the doctrine of superseding cause serves as a significant limitation on a commercial vendor's liability." Schooley, 134 Wn.2d at 482. Third, because the purchase, possession, or consumption of alcohol by a minor is illegal under RCW 66.44.270(2), when the person injured is an intoxicated minor between the ages of 6 and 20, the violation of the statute may be introduced as evidence of that minor's contributory negligence. Schooley, 134 Wn.2d at 481, 483.

Fourth, "if the minor's intoxication results in that person being more than 50 percent at fault for his or her own injuries, then no recovery is allowed." Schooley, 134 Wn.2d at 481; see also RCW 5.40.060. Fifth, if the vendor has taken the requisite steps to check identification and obtain a signed certification card, the vendor is immunized from all criminal and civil liability. Schooley, 134 Wn.2d at 481; Crowe, 134 Wn.2d at 519; RCW 66.20.210.

[Current as of February 2021.]

WPI 370.08

FURNISHING ALCOHOL TO MINORS—COMMERCIAL VENDOR—BURDEN OF PROOF

[On (name of plaintiff)'s claim that (name of defendant) negligently [sold] [served] [furnished] alcohol to (name of minor), a minor,] (name of plaintiff) has the burden of proving each of the following propositions:

(1) That (name of defendant) was a commercial vendor of alcohol;

(2) That (name of defendant) [sold] [served] [furnished] alcohol to (name of minor);

(3) That (name of defendant) failed to take reasonable precautions to verify (name of minor)'s age before [selling] [serving] [furnishing] alcohol to [him] [her]; and

(4) That the [sale] [service] [furnishing] of alcohol to (name of minor) was a proximate cause of (name of plaintiff or decedent)'s [injury] [death].

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for (name of defendant) [on this claim].

NOTE ON USE

Use this instruction for claims that a commercial vendor negligently furnished alcohol to a minor and proximately caused injury to that minor or to third persons injured by that minor. Use WPI 370.10 (Furnishing Alcohol to Minors—Commercial Vendor—Minor Transferee—Burden of Proof) instead of this instruction if the case involves a claim of injury resulting from a minor purchaser's transfer of alcohol to another minor.

Use this instruction with WPI 370.07 (Furnishing Alcohol to Minors—Duty of Commercial Vendor).

Use the bracketed language as applicable. If the furnishing of alcohol to a minor is the only claim in the case, do not include the bracketed language in the first and last paragraphs.

Use WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence), with this instruction.

COMMENT

For a discussion of issues relating to this instruction, see the Comment to WPI 370.07 (Furnishing Alcohol to Minors—Duty of Commercial Vendor).

[Current as of February 2021.]

WPI 370.09

FURNISHING ALCOHOL TO MINORS—COMMERCIAL VENDOR—MINOR TRANSFEREE

A commercial vendor of alcohol who [sells] [serves] [furnishes] alcohol to a minor is liable to other minors with whom the alcohol was shared, or to third persons who sustain foreseeable alcohol-related injuries as a result of the sharing of the alcohol with other minors, if it was foreseeable that the minor who obtained the alcohol would share it with such other minors.

In determining whether or not it was foreseeable that a minor who obtained alcohol from a commercial vendor would share it with other minors, you may consider the amount and character of the alcohol purchased or furnished, the time of day, the presence of other minors on the premises or in a vehicle, and statements made by the minor who obtained the alcohol, together with any other factors bearing on the question.

NOTE ON USE

Use this instruction if the case involves a minor's transfer of alcohol to another minor and there is an issue as to whether such a transfer was foreseeable.

COMMENT

An alcohol vendor is only responsible for the foreseeable consequences of the vendor's actions. E.g., Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 481, 951 P.2d 749 (1998); Crowe v. Gaston, 134 Wn.2d 509, 516, 951 P.2d 1118 (1998); Burkhart v. Harrod, 110 Wn.2d 381, 395, 755 P.2d 759 (1988). "If a trier of fact could reasonably find it foreseeable that the negligent sale of alcohol to a minor risks exposing other minors to injury, then it may hold the vendor liable for injuries proximately caused by the sale." Rinks v. Bearss, 83 Wn.App. 334, 338, 921 P.2d 558 (1996).

Whether it was foreseeable that a minor who obtained alcohol from a commercial vendor would share the alcohol with other minors, resulting in injury either to such other minors or to third persons, is gener-

ally a question of fact for the jury. Schooley, 134 Wn.2d at 477; Crowe, 134 Wn.2d at 517. In determining whether it was foreseeable, the jury may consider, but is not limited to considering, "the amount and character of the beverages purchased, the time of day, the presence of other minors on the premises or in a vehicle, and statements made by the purchaser." Schooley, 134 Wn.2d at 477–78; see also Crowe, 134 Wn.2d at 517.

[Current as of February 2021.]

WPI 370.10

FURNISHING ALCOHOL TO MINORS—COMMERCIAL VENDOR—MINOR TRANSFEREE—BURDEN OF PROOF

[On (name of plaintiff)'s claim that (name of defendant) was negligent in [selling] [serving] [furnishing] alcohol to (name of minor purchaser),] (name of plaintiff) has the burden of proving each of the following propositions:

(1) That (name of defendant) was a commercial vendor of alcohol;

(2) That (name of defendant) [sold] [served] [furnished] alcohol to (name of minor purchaser);

(3) That (name of defendant) failed to take reasonable precautions to verify (name of minor purchaser)'s age before [selling] [serving] [furnishing] alcohol to [him] [her];

(4) That it was foreseeable that (name of minor purchaser) would share the alcohol with [(name of minor transferee)] [another minor] [other minors]; and

(5) That the [sale] [service] [furnishing] of alcohol to (name of minor purchaser) was a proximate cause of (name of plaintiff or decedent)'s [injury] [death].

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for (name of defendant) [on this claim].

NOTE ON USE

Use this instruction if the case involves a claim of injury arising from a minor purchaser's transfer of alcohol to another minor. Use WPI

370.07 (Furnishing Alcohol to Minors—Duty of Commercial Vendor) and WPI 370.09 (Furnishing Alcohol To Minors—Commercial Vendor—Minor Transferee) with this instruction.

Use bracketed material as applicable. If the furnishing of alcohol to a minor who shared the alcohol with another minor is the only claim in the case, do not use the bracketed language in the first and last paragraphs.

Use WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence), with this instruction.

[Current as of February 2021.]

WPI 370.11

FURNISHING ALCOHOL TO MINORS—COMMERCIAL VENDOR—CERTIFICATION CARD DEFENSE

It is a complete defense to an action for damages for injuries arising out of a commercial [sale] [service] [furnishing] of alcohol to a minor that the commercial vendor [through its employee(s)] checked the buyer's identification and had the buyer sign a proper certification card.

NOTE ON USE

Use this instruction if there is evidence that the vendor checked the buyer's identification and had the buyer sign a certification card. If there is an issue as to whether the certification card meets the statutory requirements of RCW 66.20.190, an additional instruction setting forth those requirements should be used.

COMMENT

RCW 66.20.210(1) provides that:

> No licensee or the agent or employee of the licensee may be prosecuted criminally or be sued in any civil action for serving liquor to a person under legal age to purchase liquor if such person has presented a card of identification in accordance with RCW 66.20.180, and has signed a certification card as provided in RCW 66.20.190.

If the commercial vendor complies with these steps, but the minor still purchases alcohol, the vendor is immune from civil liability with regard to the sale of alcohol to the minor. Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 481, 951 P.2d 749 (1998); Crowe v. Gaston, 134 Wn.2d 509, 518–19, 951 P.2d 1118 (1998). As the court explained in Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 481, 951 P.2d 749 (1998):

> The alcohol vendor . . . has full control at the point of sale. The duty is not onerous, all the vendor has to do is ask the purchaser for valid identification in order to verify that he or she is of legal age to purchase alcohol. See RCW 66.20.180. Moreover, the alcohol vendor has within its own control the power to immunize itself from

liability for a minor's alcohol-related conduct. If, after a purchaser presents identification, the vendor still has doubts about the purchaser's age the vendor can fill out and have the purchaser sign a certification card complying with RCW 66.20.190. If the vendor completes these simple steps, but, nevertheless, the minor purchases alcohol, the vendor is immune from any criminal or civil liability regarding the sale of alcohol to the minor.

Under RCW 66.20.190, a certification card should be a five-inch by eight-inch card containing in bold-face type a statement that "the signer understands that conviction for unlawful purchase of alcoholic beverages or misuse of the certification card may result in criminal penalties including imprisonment or fine or both." An accurate description and serial number of the identification presented by the signer should be recorded on the certification card.

[Current as of February 2021.]

WPI 370.12

FURNISHING ALCOHOL TO MINORS—DUTY OF SOCIAL HOST

A social host owes a duty to exercise reasonable care not to furnish alcohol to a minor. A minor [, for purposes of this instruction,] is a person under the age of twenty-one. [A social host owes this duty only to the minor to whom [it] [he] [she] furnished alcohol.]

NOTE ON USE

Use this instruction for claims that a social host negligently furnished alcohol to a minor. Use bracketed language as applicable. Use WPI 370.13 (Furnishing Alcohol to Minors—Social Host—Burden of Proof) with this instruction.

If contributory negligence of the minor is asserted as a defense, use the appropriate instructions contained in WPI Chapter 11 (Contributory Negligence and Imputed Negligence), WPI Chapter 12 (Specific Factors Affecting Negligence and Contributory Negligence), WPI Chapter 16 (Defenses), and/or WPI Chapter 60 (Statutory Violations).

COMMENT

Under RCW 66.44.270(1), it is a criminal act for any person, including a social host, to furnish liquor to a minor, i.e., a person under the age of twenty-one. The statute does not apply, however, to liquor given by the minor's parent or guardian, liquor given for medicinal purposes by a parent, guardian, physician or dentist, minimal amounts of liquor given in connection with religious services, or liquor provided to a student in accordance with a special permit issued under RCW 66.20.010 (12).

The duty and its source. Based upon RCW 66.44.270(1), the Washington Supreme Court has held that "social hosts owe a duty to exercise ordinary care not to furnish liquor to a minor." Hansen v. Friend, 118 Wn.2d 476, 485, 824 P.2d 483 (1992). Since the enactment of RCW 5.40.050, breach of this statutory duty is not negligence per se, but may be considered as evidence of negligence. Hansen, 118 Wn.2d at 483. Thus, the trier of fact may find a social host's statutory violation is not negligence, for example, "where the violation is due to some cause beyond the violator's control, and ordinary care could not have guarded against the violation." Hansen, 118 Wn.2d at 483.

Although RCW 66.44.270(1) also makes it a criminal act for any person to "permit [a minor] to consume liquor on his or her premises or on any premises under his or her control," Washington courts have declined to extend the social host's common law duty of reasonable care beyond the duty announced in *Hansen*, i.e., the duty to exercise reasonable care not to furnish alcohol to a minor. Estate of Templeton v. Daffern, 98 Wn.App. 677, 990 P.2d 968 (2000). As the court explained in *Templeton*:

> Although the host owes a common law duty of reasonable care to a minor whom the host has knowingly furnished with alcohol, the social host does not owe a common law duty of reasonable care to a minor whom the host has not furnished with alcohol, even if the host permits the minor to consume, on the host's premises, alcohol that the minor obtained elsewhere.

Estate of Templeton, 98 Wn.App. at 690.

A social host who furnishes alcohol to a minor is not liable to the same extent as a commercial vendor. A landowner who does not know his property is being used for keg parties is not liable to a third person for injuries caused by a drunken attendee. Baynes v. Rustler's Gulch Syndicate, 142 Wn.App. 335, 173 P.3d 1000 (2007). The social host owes a duty of care only to the minor to whom the alcohol was furnished, and not to third persons. See, e.g., Reynolds v. Hicks, 134 Wn.2d 491, 496–502, 951 P.2d 761 (1998); Crowe v. Gaston, 134 Wn.2d 509, 520–22, 951 P.2d 1118 (1998); Mills v. Estate of Schwartz, 44 Wn.App. 578, 584–86, 722 P.2d 1363 (1986).

Public policy. The Washington Supreme Court has found there is good reason not to apply common law liability to social hosts as it is applied to commercial and quasi-commercial hosts. "Social hosts are not as capable of handling the responsibilities of monitoring their guests' alcohol consumption as are their commercial and quasi-commercial counterparts . . . ." Reynolds, 134 Wn.2d at 497 (quoting Burkhart v. Harrod, 110 Wn.2d 381, 386–387, 755 P.2d 759 (1988)). Further, the Washington Supreme Court has held that RCW 66.44.270(1) was enacted to protect minors from injuries resulting from their own abuse of alcohol, not to protect third parties injured by intoxicated minors. Reynolds, 134 Wn.2d at 498–501; Crowe, 134 Wn.2d at 521.

Limitations of liability. The liability of a social host to a minor to whom the social host has negligently furnished alcohol is not limitless. First, the concept of foreseeability determines the scope of the duty owed. Hansen, 118 Wn.2d at 483; Christen v. Lee, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989). Thus, "the harm sustained must be reasonably

perceived as being within the general field of danger covered by the specific duty owed by the defendant." Hansen, 118 Wn.2d at 484 (quoting Christen, 113 Wn.2d at 492).

Second, because the purchase, possession, or consumption of alcohol by a minor is illegal under RCW 66.44.270(2), when the person injured is an intoxicated minor under the age of 21, the violation of the statute may be introduced as evidence of that minor's contributory negligence. Schooley v. Pinch's Deli Market, 134 Wn.2d 468, 481, 483, 951 P.2d 749 (1998); Hansen, 118 Wn.2d at 484.

Third, "if the minor's intoxication results in that person being more than 50 percent at fault for his or her own injuries, then no recovery is allowed." Schooley, 134 Wn.2d at 481; RCW 5.40.060. RCW 5.40.060 provides a complete defense to an action for damages for personal injury or wrongful death if the person injured or killed was under the influence of intoxicating liquor at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to be more than fifty percent at fault. Hansen, 118 Wn.2d at 484; see WPI 16.03 (Intoxication of Person Injured or Killed—Defense).

[Current as of February 2021.]

WPI 370.13

FURNISHING ALCOHOL TO MINORS—SOCIAL HOST—BURDEN OF PROOF

[On (name of plaintiff)'s claim that (name of defendant), a social host, negligently furnished alcohol to (name of minor),] (name of plaintiff) has the burden of proving each of the following propositions:

(1) That (name of defendant) furnished alcohol to (name of minor);

(2) That (name of defendant) failed to exercise reasonable care not to furnish alcohol to minors when it furnished alcohol to (name of minor); and

(3) That the furnishing of alcohol to (name of minor) proximately caused (name of minor)'s [injury] [death].

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if you find that any of these propositions has not been proved, then your verdict should be for (name of defendant) [on this claim].

NOTE ON USE

Use this instruction for claims that a social host negligently furnished alcohol to a minor. Use WPI 370.12 (Furnishing Alcohol to Minors—Duty of Social Host) with this instruction.

Use WPI 21.01 (Meaning of Burden of Proof—Preponderance of the Evidence) with this instruction.

Use bracketed language as applicable. If the furnishing of alcohol to a minor by a social host is the only claim in the case, do not use the bracketed language in the first and last paragraphs.

[Current as of February 2021.]

PART XXI

NUISANCE

CHAPTER 380

NUISANCE

WPI 380.00 Introduction
WPI 380.01 Nuisance in General—Definition
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WPI 380.00

INTRODUCTION

This chapter sets forth pattern instructions for some common nuisance issues.

Overview of the law. State law nuisance claims are based on specific statutory provisions and the common law. Tiegs v. Watts, 135 Wn.2d 1, 14, 954 P.2d 877 (1998). Nuisance claims may be brought either by public entities to abate public nuisances or by private individuals for damages and abatement of public or private nuisances. RCW 7.48.020; RCW 4.48.210; RCW 7.48.220. Nuisance law is codified at the state level in RCW Chapter 7.48. According to RCW 7.48.010, nuisance is actionable for: "whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of . . . life and property."

The Legislature broadly defined nuisance as "unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others . . . or in any way renders other persons insecure in life, or in the use of

property." RCW 7.48.120. This general definition is set forth in WPI 380.01 in an easy to read format. For a clear statement of the elements and nature of a nuisance action, see Grundy v. Thurston Cnty., 155 Wn.2d 1, 6–7, 117 P.3d 1089 (2005).

Other sections of RCW Chapter 7.48 offer more specific examples of nuisances. RCW 7.48.140 prohibits certain public nuisances. Other state and local provisions may also form the basis of a nuisance claim. Kitsap Cnty. v. Kev, Inc., 106 Wn.2d 135, 138, 720 P.2d 818 (1986). State, county, and municipal codes are possible sources for legal authority regarding a claim of nuisance. See King Cnty. ex rel. Sowers v. Chisman, 33 Wn.App. 809, 658 P.2d 1256 (1983); see, e.g., Pierce County Code 8.08.010 (nuisances affecting public health); King County Code 23.02; State Shoreline Management Act, RCW Chapter 90.58; Uniform Building Code, RCW 19.27.031; RCW 9.66.010 (criminal code statement of public nuisance).

State law can also make lawful what might otherwise be considered a public nuisance. See Chelan Basin Conservancy v. GBI Holding Co., 190 Wn.2d 249, 413 P.3d 549 (2018) (landfill creating an impediment in a navigable waterway previous to 1969 was lawful pursuant to adoption of RCW 98.58.270(1) and was not a public nuisance under RCW 7.48.140(3)).

Even an otherwise legal use of one's property that unreasonably interferes with a neighbor's use and enjoyment of his/her property may be a nuisance. MJD Props., LLC v. Haley, 189 Wn.App. 963, 358 P.3d 476 (2015) (a driveway light unnecessarily shining in a neighbor's bedroom window, or a "spite tree" planted to obstruct the view may constitute a nuisance). Determining whether activity is a nuisance requires balancing "the rights, interests and convenience" unique to the case. Where a nuisance exists, it is not excused by the otherwise lawful quality of the business. MJD Properties, 189 Wn.App. at 970 (fact outdoor light complies with city code does not mean it cannot be a nuisance).

RCW Chapter 7.48 draws a distinction between public nuisances and private nuisance. A public nuisance is a nuisance that "affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal." See, e.g., Kitsap Cnty. v. Kitsap Rifle & Revolver Club, 184 Wn.App. 252, 286–87, 337 P.3d 328 (2014) (finding a public nuisance where noise affected neighborhood even where some individuals within the neighborhood were not bothered). A public nuisance action may be maintained by a government entity or may be brought by a private person if the person is specifically injured by the nuisance activity. RCW 7.48.210; see e.g., Miotke v. City of Spokane, 101 Wn.2d 307, 331–32, 678 P.2d 803 (1984),

abrogated on other grounds, Blue Sky Advocs. v. State, 107 Wn.2d 112, 727 P.2d 644 (1986) (private waterfront residents allowed to maintain a public nuisance action for sewage bypass into lake because, while the entire community was impacted by the sewage, the waterfront residents' injuries were greater than those suffered by the general public).

Statutes on farms and forests. The Right to Farm Act, RCW 7.48.300–.310, protects farm and forest owners from nuisance lawsuits in urbanizing areas. Alpental Cmty. Club v. Seattle Gymnastics Soc., 154 Wn.2d 313, 317–23, 111 P.3d 257 (2005) (forestry); Buchanan v. Simplot Feeders, Ltd. P'ship, 134 Wn.2d 673, 680, 952 P.2d 610 (1998) (farming). The Right to Farm Act creates a statutory immunity and codifies the affirmative defense of coming to the nuisance.

If plaintiff and defendant are neighbors who each own rural property, and both parties have put their property to rural use, then defendant cannot rely on the Right to Farm Act. Buchanan, 134 Wn.2d at 684 (cattle ranch and stockyard-owner defendant could not rely on Right to Farm Act, when plaintiff—owner of a neighboring farm—sued for nuisance; both parties were rural; the flies and manure from defendant's cattle ranch were causing a nuisance by harming plaintiff's crops; the court held that Right to Farm Act did not apply, because legislative intent of Right to Farm Act is to prevent rural farmers and forest owners from having to defend against lawsuits brought by landowners that can be classified as urbanizing plaintiffs; if both parties are engaged in rural practices, then Right to Farm Act does not shield the defendant).

To qualify for statutory protection, the agricultural or forest practice must meet three conditions: (1) the farming or forestry activity is consistent with good practices; (2) the farming or forestry activity was established before the surrounding non-agricultural or non-forestry activity; and (3) the farming or forestry activity does not have a "substantial adverse effect on public health and safety." See Davis v. Taylor, 132 Wn.App. 515, 132 P.3d 783 (2006) (farm owners used loud propane cannons and cherry guns, day and night, to scare birds away from cherry trees; plaintiffs, who owned a home in a nearby housing development, sued to enjoin the noise as a nuisance; the court held that Right to Farm Act did not provide farm owners with immunity from nuisance lawsuit, because the farmers grew only apple trees before the housing development began; cherry trees, and the noisy cannons and guns used to protect the cherries, did not qualify as pre-existing agricultural activities); Vicwood Meridian P'ship v. Skagit Sand & Gravel, 123 Wn.App. 877, 882–887, 98 P.3d 1277 (2004) (foul-smelling composting facility, used in mushroom farming business, qualified for statutory immunity and coming to the nuisance affirmative defense, because compost is necessary for mushroom farming).

Nuisance claim distinguished from negligence. Practitioners should be aware that a nuisance claim that is simply a restated negligence claim need not be the subject of a separate instruction on nuisance. A party's characterization of the theory of recovery is also not binding upon the court. It is the nature of the claim that controls. Accordingly, the trial court's refusal to give a proposed instruction on nuisance that was based upon the same omission to perform a duty that was alleged to constitute negligence has been held to be proper under Washington law. See, e.g., Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 527, 799 P.2d 250 (1990); Kaech v. Lewis Cnty. Pub. Util. Dist., 106 Wn.App. 260, 23 P.3d 529 (2001); cf. Albin v. Nat'l Bank of Com., 60 Wn.2d 745, 753, 375 P.2d 487 (1962).

Overview of instructions. The pattern instructions include some common examples of nuisance. WPI 380.01.01 (Nuisance—Example of Modified Definition—Interference With Use of Street or Highway) sets out a pattern instruction regarding an obstruction of a street or highway. Each law of the state, county, or city will have unique language; the jury instructions defining nuisance and describing the burden of proof will need to be tailored to fit the statutory framework.

The statutory definition of a public nuisance is set forth in WPI 380.02 (Public/Private Nuisance—Definition). For cases in which the public nuisance action is being brought by a private individual, the jury will need this definition to determine if the private individual may recover. RCW 7.48.210; Hostetler v. Ward, 41 Wn.App. 343, 704 P.2d 1193 (1985).

Other situations will require that the jury balance the rights, interests, and convenience of the defendant against those of the plaintiff. WPI 380.03 explains this balancing test.

Conduct or activity on property that violates specific statutes may be a nuisance per se. WPI 380.04 addresses these situations. However, the failure to obtain required permits does not turn the activity into a nuisance per se. Moore v. Steve's Outboard Serv., 182 Wn.2d 151, 339 P.3d 169 (2014).

Two burden of proof instructions are offered, one for the plaintiff's case (WPI 380.05 (Nuisance—Burden of Proof—No Affirmative Defense)) and one for the affirmative defense of assumption of risk (coming to the nuisance, WPI 380.06).

[Current as of February 2021.]

WPI 380.01

NUISANCE IN GENERAL—DEFINITION

Nuisance is unlawfully doing an act or failing to perform a duty, which act or failure to act:

[(1)] [Annoys, injures, or endangers the comfort, repose, health, or safety of others] [or]

[(2)] [Offends decency] [or]

[(3)] [Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake, navigable river, bay, stream, canal, or basin] [or]

[(4)] [Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage any public park, square, street, or highway] [or]

[(5)] [In any way renders other persons insecure in life, or in the use of property].

NOTE ON USE

This instruction defines nuisance generally. Select the bracketed paragraphs that are appropriate to the case and renumber accordingly. Use this instruction along with the balancing test instruction (WPI 380.03) when the case does not involve nuisance per se. Use this instruction along with WPI 380.06 (Nuisance—Burden of Proof—Assumption of Risk Defense (Coming to the Nuisance)) for cases in which the defendant uses the affirmative defense of "coming to the nuisance."

Alternatively, the jury may be instructed using a definition derived from more specific statutes or ordinances. See the Comment below.

COMMENT

This instruction is based on RCW 7.48.120. The Supreme Court approved a similar instruction in Tiegs v. Watts, 135 Wn.2d 1, 10, 15, 954 P.2d 877 (1998). Elements of a nuisance action are set forth in Grundy v. Thurston Cnty., 155 Wn.2d 1, 6–7, 117 P.3d 1089 (2005); MJD Props.,

LLC v. Haley, 189 Wn.App. 963, 358 P.3d 476 (2015) (spite tree and garage driveway light).

Chelan Basin Conservancy v. GBI Holding Co., 190 Wn.2d 249, 413 P.3d 549 (2018), held that a landfill created prior to 1969 on Lake Chelan was lawful pursuant to the Legislature's enactment of RCW 98.58. 270(1) and not a public nuisance under RCW 7.48.140(3) (impediment to a navigable waterway).

Definitions of nuisance may be found in sources other than RCW 7.48.120, including other statutes and local ordinances. See, e.g., RCW 7.48.140. An ordinance may characterize an activity as a nuisance, but only if "it is in fact a nuisance." Kitsap Cnty. v. Kev, Inc., 106 Wn.2d 135, 138, 720 P.2d 818 (1986). Under certain conditions, it may be permissible to use nuisance per se and strict liability to bypass the balancing test in a public nuisance action brought by a public entity; under other conditions it may be unconstitutional to remove the balancing test from the elements of proof. See City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, 638, 641–47, 211 P.3d 406 (2009) (city violated church's right to freedom of religion under Article 1, Section 11 of the Washington State Constitution, by issuing a moratorium that was not narrowly drawn, by refusing to consider the church's permit application, and by violating the contract).

Depending on the facts of the case, instructing the jury using one of these other definitions may be appropriate. For an example of how to draft a definition that is based on violations of other statutes, see WPI 380.01.01 (Nuisance—Example of Modified Definition—Interference with Use of Street or Highway). For other examples of nuisance per se based on statutes and regulations, refer to the Comment to WPI 380.04.

[Current as of February 2021.]

WPI 380.02

PUBLIC/PRIVATE NUISANCE—DEFINITION

A public nuisance is one that affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal. Every other nuisance is a private nuisance.

NOTE ON USE

Use this instruction when a private person brings an action for public nuisance.

COMMENT

This instruction incorporates the language of RCW 7.48.130 and 7.48.150, which define public and private nuisance. RCW 7.48.140 lists specific examples of public nuisances, e.g., depositing an animal carcass in a public area, obstructing a river or public highway, manufacturing gun powder, establishing powder magazines, creating obnoxious exhalations or smells, and selling intoxicating liquors in inappropriate areas.

Noise from a shooting range that affected the entire neighborhood was a public nuisance even though some individuals within the neighborhood were not bothered. Kitsap Cnty. v. Kitsap Rifle & Revolver Club, 184 Wn.App. 252, 286–87, 337 P.3d 328 (2014).

Private parties must meet the threshold requirement of RCW 7.48.210 in order to maintain an action for public nuisance: "A private person may maintain a civil action for a public nuisance, if it is specifically injurious to himself or herself but not otherwise." RCW 7.48.210; Hostetler v. Ward, 41 Wn.App. 343, 356–57, 704 P.2d 1193 (1985); see also State v. Grant, 156 Wash. 96, 286 P. 63 (1930); In re Hanford Nuclear Reservation Litig., 780 F.Supp. 1551, 1576 (E.D. Wash. 1991) (applying *Grant*).

[Current as of February 2021.]

WPI 380.03

NUISANCE—BALANCING TEST

In determining whether the defendant has caused a nuisance, you must balance the rights, interests, and convenience of the defendant against the rights, interests, and convenience of the plaintiff. The inconvenience, discomfort, or interference that the plaintiff suffers must be measured according to what a person of ordinary and normal sensibilities would suffer.

There is no precise measure of the amount of discomfort that an act must produce in order to constitute a nuisance. Rather, the fundamental inquiry is whether the use to which the property is put is reasonable or unreasonable. An otherwise lawful action may still be a nuisance if it is an unreasonable use of property. In determining what is the reasonable use of the property, you must consider all of the surrounding facts and circumstances, including the character of the neighborhood, the social utility of the activity, manner of use, and circumstances of the activity.

NOTE ON USE

Use this instruction with WPI 380.01 (Nuisance In General—Definition). If there is an affirmative defense of "coming to the nuisance," use this instruction with WPI 380.06 (Nuisance—Burden of Proof—Assumption of Risk Defense (Coming to the Nuisance)). This instruction should be used only for nuisances that require a balancing test. For cases of nuisance per se, use WPI 380.04 instead of this instruction.

COMMENT

The language of this instruction is taken substantially from Morin v. Johnson, 49 Wn.2d 275, 300 P.2d 569 (1956), and Riblet v. Spokane-Portland Cement Co., 41 Wn.2d 249, 248 P.2d 380 (1952), overruled on other grounds by Bradley v. American Smelting and Refining Co., 104 Wn.2d 677, 709 P.2d 782 (1985). See also Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 923, 296 P.3d 860 (2013); MJD Props., LLC v. Haley, 189 Wn.App. 963, 358 P.3d 476 (2015); Boyle v. Leech, 7

Wn.App.2d 535, 436 P.3d 393 (2019) (a tree that grows entirely on the owner's property without overhanging branches or encroaching roots is not a nuisance).

Several recent cases have addressed the balancing test in the context of summary judgment. The social utility of the challenged activity is a factor considered in Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 923, 296 P.3d 860 (2013) (power production plant) and Kitsap County v. Kitsap Rifle and Revolver Club, 184 Wn.App. 252, 286–87, 337 P.3d 328 (2014) (a shooting range). Social utility requires evaluation of the character of the neighborhood where the activity occurs and the degree of community dependence on the particular activity. Lakey, 176 Wn.2d at 923; Grundy v. Thurston Cnty., 155 Wn.2d 1, 7 n.5, 117 P.3d 1089 (2005); Highline Sch. Dist., No. 401 v. Port of Seattle, 87 Wn.2d 6, 17 n.7, 548 P.2d 1085 (1976).

[Current as of February 2021.]

WPI 380.04

NUISANCE PER SE

A statute provides as follows:

(Insert a brief description of the requirements of the statute.)

If you find that (name of defendant) **violated this statute, then you must find that** (name of defendant) **committed a nuisance and that** (name of plaintiff) **has satisfied its burden of proving the first and second propositions found in Instruction** (fill in number of the instruction that is based on WPI 380.05).

NOTE ON USE

Use when the plaintiff alleges violation of a statute or regulation that is, by its terms, a nuisance per se. Use this instruction with WPI 380.05 (Nuisance—Burden of Proof—No Affirmative Defense).

COMMENT

Engaging in any business or profession in violation of the law regulating or prohibiting the same is a nuisance per se. Kitsap Cnty. v. Kev, Inc., 106 Wn.2d 135, 138, 720 P.2d 818 (1986); see Tiegs v. Boise Cascade Corp., 83 Wn.App. 411, 416, 420, 922 P.2d 115 (1996), affirmed, Tiegs v. Watts, 135 Wn.2d 1, 13, 954 P.2d 877 (1998). Failure to obtain required use permits and business licenses does not turn an otherwise lawful activity into a nuisance per se. Moore v. Steve's Outboard Serv., 182 Wn.2d 151, 339 P.3d 169 (2014). In *Moore*, the operation of an outboard motor repair business without all the required permits did not render the business a nuisance per se. Conversely, erecting a fence on an easement in violation of the county code was a nuisance per se. Littlefair v. Schulze, 169 Wn.App. 659, 278 P.3d 218 (2012).

A nuisance per se is an act, thing, omission, or use of property which of itself is a nuisance, and hence is not permissible or excusable under any circumstance. Watts, 135 Wn.2d at 13. Thus, a nuisance per se results in strict liability. Boise Cascade Corp., 83 Wn.App. at 418. Although an act may not be a nuisance per se, it may still constitute a nuisance in fact by reason of circumstances. See Watts, 135 Wn.2d at 13.

RCW 90.48.080 (discharge of polluting matter in waters prohibited).

Tiegs v. Boise Cascade Corp., 83 Wn.App. 411, 922 P.2d 115 (1996), affirmed, Tiegs v. Watts, 135 Wn.2d 1, 13, 954 P.2d 877 (1998), also approved inclusion of the legislative policy statement for the Water Pollution Control Act in RCW 90.48.010 with an instruction on RCW 90.48.080.

Several statutes creating nuisances per se can be found in RCW Chapters 7.48 and 7.48A. Many others are located elsewhere in the revised code. See, e.g., RCW 7.42.010 (strict liability for a nuisance when a building or unit within a building is used for illegal activities involving controlled substances); City of Seattle v. McCoy, 101 Wn.App. 815, 4 P.3d 159 (2000) (city filed a nuisance per se action under RCW 7.42.010 against night club owner for drug activity; property owners attempted to abate the nuisance, contacted law enforcement, and ultimately were unable to control drug activity caused by patrons and others in the neighborhood; temporary takings doctrine was applied, and the city's enforcement of the nuisance action was held unconstitutional as applied); see also Paradise, Inc. v. Pierce Cnty., 124 Wn.App. 759, 772–73, 102 P.3d 173 (2004) (RCW 9.46.295 and ordinance did not define gambling as a nuisance, but the statutory language implied legislative intent to categorize gambling as a nuisance); City of Woodinville v. Northshore United Church of Christ, 139 Wn.App. 639, 660–61, 162 P.3d 427 (2007), reversed on other grounds, 166 Wn.2d 633, 638, 641–47, 211 P.3d 406 (2009) (see discussion of this case in the Comment for WPI 380.01 (Nuisance In General—Definition)).

Other statutes that may support a nuisance per se claim include: RCW 4.24.040 (fire); RCW 14.08.030(4) (objects and plants at airports); RCW 16.08.010 and 16.08.040 (dogs); RCW 16.24.110 (unrestrained horses, mules, donkeys, cattle); RCW 17.28.170 and 17.28.185 (mosquitoes); RCW 35.88.080 (sewage); RCW 46.55.240 and 47.41.070 (junk); RCW 67.16.060 (horse racing); RCW 77.57.030 (property owner with a dam or obstruction, after having been served with notice to construct a fishway); RCW 90.48.142 (water pollution); and RCW 90.64.030 (water pollution caused by dairy cattle).

[Current as of February 2021.]

WPI 380.05

NUISANCE—BURDEN OF PROOF—NO AFFIRMATIVE DEFENSE

(Name of plaintiff) has the burden of proving each of the following propositions with respect to the claim of nuisance:

(1) That (name of defendant) [acted unlawfully] [failed to perform a duty]; and

(2) That the [unlawful act] [failure to perform a duty]:

[annoyed, injured, or endangered the comfort, repose, health, or safety of others;] [or]

[offended decency;] [or]

[unlawfully interfered with, obstructed or tended to obstruct, or rendered dangerous for passage, any lake, navigable river, bay, stream, canal, or basin;] [or]

[unlawfully interfered with, obstructed or tended to obstruct, or rendered dangerous for passage any public park, square, street, or highway;] [or]

[in any way rendered other persons insecure in life, or in the use of property;] [and]

(3) That (name of defendant)'s [act] [failure to perform a duty] was a proximate cause of [injury to (name of plaintiff)] [and] [or] [damage to (name of plaintiff)'s property].

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for (name of plaintiff) on the nuisance claim. On the other hand, if any of these propositions has not

been proved, your verdict should be for (name of defendant) **on the nuisance claim.**

NOTE ON USE

Use with WPI 380.01 (Nuisance in General—Definition). For cases using a modified definition of nuisance under WPI 380.01.01 (Nuisance—Example of Modified Definition—Interference with Use of Street or Highway), modify the instruction along the lines discussed in the Comment below.

COMMENT

The form of this instruction comes from WPI 21.02 (Burden of Proof on the Issues—No Affirmative Defense).

The instruction incorporates the language of RCW 7.48.120 and the ruling of the Washington Supreme Court in Tiegs v. Watts, 135 Wn.2d 1, 954 P.2d 877 (1998).

The elements in the instruction are drafted to track the definition of nuisance that the jurors receive in WPI 380.01 (Nuisance in General—Definition), which is based on the statutory definition contained in RCW 7.48.120. In some cases, however, the jurors will be instructed with a modified definition of nuisance, based on sources of law other than RCW 7.48.120, such as WPI 380.01.01 (Nuisance—Example of Modified Definition—Interference with Use of Street or Highway). For these cases, the instruction above will need to be revised to track the modified definition.

[Current as of February 2021.]

WPI 380.06

NUISANCE—BURDEN OF PROOF—ASSUMPTION OF RISK DEFENSE (COMING TO THE NUISANCE)

It is a defense to an action for damages based upon a claim of nuisance, that the plaintiff assumed the risk of harm or loss by locating at or near an established local nuisance. Though this fact (if proved) does not absolutely bar (name of plaintiff)'s claim for damages, it is one factor to be considered by you when considering how much, (if any), damages you should award (name of plaintiff).

The defendant, (name of defendant), has the burden of proving the following proposition:

> **That (name of plaintiff) knew of (name of defendant)'s use of [his] [her] property when (name of plaintiff) [purchased property] [improved property] [elected to live] in close proximity to (name of defendant)'s property. In this context, "use of property" means the use that (name of plaintiff) contends was the cause of [his] [her] damages.**

If you find from your consideration of all the evidence that this proposition has been proved, then, using 100% as the total combined conduct of the parties (nuisance and assumption of risk) which contributed to (name of plaintiff)'s damages, you must reduce the total damages you find to have been sustained by (name of plaintiff), by the percentage of that conduct attributable to the risk assumed by (name of plaintiff). I will furnish you with a special verdict form for this purpose.

NOTE ON USE

Use this instruction for cases involving the defense of assumption of risk. This instruction will be used together with the general definition instruction, WPI 380.01, and the balancing test instruction, WPI 380.03, and in an appropriate case may be used with the public/private nuisance definition, WPI 380.02.

COMMENT

This instruction is based upon RCW 4.22.015; RCW 4.22.070; DiBlasi v. City of Seattle, 136 Wn.2d 865, 888, 969 P.2d 10 (1998) (concurring opinion); Buchanan v. Simplot Feeders, Ltd. Partnership, 134 Wn.2d 673, 678, 952 P.2d 610 (1998); Albin v. Nat'l Bank of Com., 60 Wn.2d 745, 753, 375 P.2d 487 (1962); and Powell v. Superior Portland Cement, 15 Wn.2d 14, 18–19, 129 P.2d 536 (1942).

[Current as of February 2021.]

Appendices

Appendix H

Consumer Protection Act *Per Se* Violations

SUBJECT	RCW AS TO DECLARATION OF UNFAIR OR DECEPTIVE ACT IN TRADE OR COMMERCE	RCW AS TO DECLARATION REGARDING PUBLIC INTEREST:	RCW AS TO DECLARATION OF NOT REASONABLE:
Academic credentials (granting/claiming)	28B.85.220		
Adoption advertising	26.33.400(3)	26.33.400(3)	
Adult family home, unlicensed	70.128.058	70.128.058	70.128.058
Airbags—motor vehicle	46.37.640	Laws of 2016, Ch. 214, § 6	Laws of 2016, Ch. 214, § 6
Animals, research	19.86.145 (referring to RCW 9.08.070 and 16.52.220)		
Athlete agents	RCW 19.225.120	RCW 19.225.120	RCW 19.225.120
Auctions	18.11.260	18.11.260	
Automotive repair	46.71.070	46.71.070	46.71.070
Automatic dial answer devices	80.36.400(3)	Laws 1986, Ch. 281, § 1	
Bail bond agents	18.185.210		18.185.210
Biometric identifiers	19.375.030	19.375.030	19.375.030
Body art, body piercing, tattooing	18.235.130; 18.300.140	18.235.130; 18.300.140	18.235.130; 18.300.140
Breastfeeding, public	49.60.030; 49.60.215	49.60.030; 49.60.215	49.60.030; 49.60.215
Broadband/Internet Access	19.385.010	19.385.010	19.385.010
Business opportunity fraud	19.110.170		
Business telephone listings	19.160.020	19.160.020	19.160.020
Camping clubs	19.105.405 19.105.500		
Cathinone/methcathinone	69.50.460	69.50.460	69.50.460
Cemetery sales	68.05.330		

CONSUMER PROTECTION ACT PER SE VIOLATIONS

SUBJECT	RCW AS TO DECLARATION OF UNFAIR OR DECEPTIVE ACT IN TRADE OR COMMERCE	RCW AS TO DECLARATION REGARDING PUBLIC INTEREST:	RCW AS TO DECLARATION OF NOT REASONABLE:
Chain distributor (pyramid) schemes	19.102.020		
Charitable solicitations	19.09.340	19.09.010	
Check cashers	31.45.190	31.45.190	
Cigarette sales	19.91.300		
Cigarette tax	82.24.035		
Collection agencies	19.16.440		
Colleges	28B.85.180	28B.85.180	
Commercial e-mail (spamming)	19.190.030	19.190.030	19.190.030
Community solar companies	82.16.170	82.16.170	82.16.170
Construction liens, coercion	60.04.035	60.04.035	60.04.035
Consumer credit reporting agencies	19.182.150	19.182.150	19.182.150
Consumer leases	63.10.050	63.10.050	63.10.050
Consumer loans	31.04.208	31.04.208	31.04.208
Consumer rebates	19.315.030	19.315.030	19.315.030
Continuing care retirement communities	18.390.080	18.390.080	18.390.080
Contractor registration	18.27.350	18.27.350	
Cord blood banks	70.54.222	70.54.222	70.54.222
Cosmetologists/hair designers/barbers/ manicurists/estheticians	18.16.250	18.16.250	18.16.250
Credit reporting agencies (Fair Credit Reporting Act)	19.182.150; 19.182.170	19.182.150; 19.182.170	19.182.150; 19.182.170
Credit service agencies	19.134.070(5)		
Debt adjusting	18.28.185		
Deed of trust sales	61.24.135		
Discrimination/Civil Rights	49.60.030(3)	49.60.030(3)	49.60.030(3)
Elder and vulnerable adult referral agencies	18.330.140	18.330.140	
Electric utilities-customer information-privacy	19.29A.110	19.29A.110	19.29A.110
Electronic communications devices (RFID/facial recognition)	19.300.030	19.300.030	19.300.030
Electronic mail, commercial (generally)	19.190.100	19.190.100	19.190.100
Electronic signatures	19.34.100		

CONSUMER PROTECTION ACT PER SE VIOLATIONS

SUBJECT	RCW AS TO DECLARATION OF UNFAIR OR DECEPTIVE ACT IN TRADE OR COMMERCE	RCW AS TO DECLARATION REGARDING PUBLIC INTEREST:	RCW AS TO DECLARATION OF NOT REASONABLE:
Electronic text messaging, commercial	19.190.060, 19.190.070	19.190.060, 19.190.070	19.190.060, 19.190.070
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CONSUMER PROTECTION ACT PER SE VIOLATIONS

SUBJECT	RCW AS TO DECLARATION OF UNFAIR OR DECEPTIVE ACT IN TRADE OR COMMERCE	RCW AS TO DECLARATION REGARDING PUBLIC INTEREST:	RCW AS TO DECLARATION OF NOT REASONABLE:
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CONSUMER PROTECTION ACT PER SE VIOLATIONS

SUBJECT	RCW AS TO DECLARATION OF UNFAIR OR DECEPTIVE ACT IN TRADE OR COMMERCE	RCW AS TO DECLARATION REGARDING PUBLIC INTEREST:	RCW AS TO DECLARATION OF NOT REASONABLE:
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CONSUMER PROTECTION ACT PER SE VIOLATIONS

SUBJECT	RCW AS TO DECLARATION OF UNFAIR OR DECEPTIVE ACT IN TRADE OR COMMERCE	RCW AS TO DECLARATION REGARDING PUBLIC INTEREST:	RCW AS TO DECLARATION OF NOT REASONABLE:
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See also the list of statutes cross-referenced in the Code Reviser's notes to the Consumer Protection Act, RCW Chapter 19.86, at http://app.leg.wa.gov/RCW/default.aspx?cite=19.86.

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